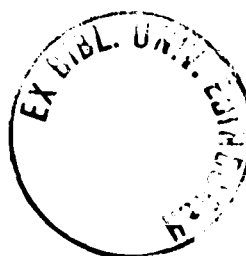


**Some Comparative Aspects of  
Specific Implement in Scots Law**

by

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Ph.D.  
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ABSTRACT OF THESIS (Regulation 7.9)

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The Scots law of specific implement of contracts may usefully be compared with the South African law on the specific performance of contracts. Both systems have been influenced by the Anglo-American law of specific performance.

The introduction to the thesis suggests a redefinition of specific implement.

Part I sketches the history of specific implement, and also the history of the remedy in Roman and Roman-Dutch law.

Part II discusses the modern law on the general right to the remedy in Scots and South African law, and the court's discretion to refuse the remedy on good grounds. The grounds of employment contracts and the impossibility of enforcing the decree of specific implement are examined; revisions are suggested in the light of modern circumstances.

Part III concentrates on the Scots remedy in the sale of goods. A study of the English legal history behind section 52 of the Sale of Goods Act 1979 permits comparison of Scots law with that of France and other countries as regards the idea that property may pass by contract. An esto argument, if property should pass by delivery, compares Scots law with that of West Germany, Switzerland, and South Africa. The final chapter discusses the economic theory of specific performance.

*For my parents and sister*

In compliance with Regulation 3.4.7. under Resolution 14/1967 (Postgraduate Studies and Research), I declare that this thesis has been composed by me and is my own work.



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In a field as practical as the modern law of contractual remedies, no scholar can be a *cadi* under a palm-tree: I am indebted to the writers whose works I have consulted.

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A list of the abbreviations which I have made would be very long. Some works to which I have frequently referred have been abbreviated to initials; and others have been abbreviated to the author's name and a short title. The system will I hope be clear from the notes following the chapters, read with the select bibliography.

## Introduction

No lawyer of Scots descent, educated in Basutoland and South Africa, could fail to be inspired by the address, *Scots Law and Roman-Dutch Law: A Shared Tradition*, which Sir Thomas Smith delivered when the Law Faculty of the University of Cape Town celebrated its centenary in 1959.<sup>1</sup> He praised the Roman-Dutch jurists and said that in the "nineteenth century, cut off from Continental influence, firstly by war and then by the tide of codification, Scots law after the Napoleonic Wars was more exposed to the blandishments of English legal doctrine and today could with advantage take cross-bearings on her position from other so-called 'mixed systems'",<sup>2</sup> of which South African law was one, particularly where the civilian principles of South African law were substantially the same as those of Scots law, in fields such as obligations and moveable property.<sup>3</sup> "[I]n Scotland today you would find a reawakened interest in our shared Civilian heritage of the past."<sup>4</sup> After South Africa had left the Commonwealth in 1961, Sir Thomas declared that it was still worth maintaining links between the two countries' legal professions:<sup>5</sup>

[I]n the field of private law particularly ... contemporary legal scholarship, valued both by the Bench and the Bar, is stripping the basically Romanistic system of South Africa of unseemly and inelegant excrescences derived from the relative immaturity of Anglo-American common law. We can learn much from these South African lawyers; and what we give intellectually and spiritually could refresh and encourage those who strive in court-house and chambers, and in public life generally, for the enlightenment of the Dark Continent.

At the 1959 centenary, Van Warmelo began his address, *Real Rights*,<sup>6</sup> by observing that

even the most familiar things or concepts are never the worse for renewed scrutiny and for being, figuratively speaking, dusted and tidied. Matters of an intellectual nature, especially those which are, to use a Gallicism, the most accepted, should always be subjected to re-examination and scrutiny by the holy goddess of Doubt.

It has seemed a useful exercise, therefore, to consider the possible similarities between specific implement of contracts in Scotland and specific performance of contracts in South Africa. Some aspects of the former remedy surprise the South African lawyer; and recent developments of the latter remedy have allowed for reconsideration and restatement, even if some uncertainty has thus been generated.

Surprise and doubt are meat and drink to the writer of a thesis. Both versions of the remedy have been influenced by the English remedy of specific performance, to which references may accordingly be made, for greater understanding. In the context of the sale of goods in particular, Scots common law, which is fairly similar to South African common law, has been affected by the Sale of Goods Acts 1893 and 1979. Research into the history of the English idea of the property passing under the sale has created opportunities for comparative references to French law and related legal systems in this area, and it is hoped may add something to the debate on the uncertain British law. In an *esto* argument, the Scots common law of specific implement concerning the sale of goods is compared with that in systems where ownership passes by delivery: West German, Swiss, and South African law. The last chapter sketches the most serious theoretical challenge to the primacy of specific implement (performance) over damages, advanced by some proponents of the economic approach to law.

The intention throughout is to make those comparisons and contrasts which would increase the effectiveness of the Scots remedy in the modern world; or at least provide scope for further reflections on why it is as it is. The originality of a thesis in comparative law lies mainly in this creation of interesting links, analogies, and contrasts; any startlingly individual theory about a system other than one's own or with which one is reasonably familiar risks glaring error. Hence the reliance on text-books and commentaries, particularly where recent acquisition of a foreign language has prevented very deep investigation of that country's law. Yet these links, analogies, and contrasts, if they help to throw new light on aspects of specific implement which are taken for granted and seem so uncontroversial in the text-books, may illustrate William Hazlitt's remark: "This is the test and triumph of originality, not to shew us what has never been, and what we may therefore very easily never have dreamt of, but to point out to us what is before our eyes and under our feet...."<sup>7</sup>

A definition of specific implement helps to show one immediate difference between Scots and South African law. The Scots remedy is in general refused where the decree sought is for the payment of money (*ad pecuniam solvendam*).<sup>8</sup> The rationale is that the decree of specific implement is a decree *ad factum praestandum*; that the sole compulsitor for the defender's disobeying a decree *ad factum praestandum* is imprisonment; and that section 4 of the Debtors (Scotland) Act reads:<sup>9</sup>

With the exceptions herein-after mentioned no person shall be apprehended or imprisoned on account of any civil debt.

There shall be excepted from the operation of the above enactment,--

1. Taxes, fines, or penalties due to Her Majesty and rates and assessments lawfully imposed or to be imposed;

Sums decerned for aliment.

Provided that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than twelve months.

Nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being in *meditatione fugae*, or under any decree or obligation *ad factum praestandum*.

South African law would assist in redefinition of specific implement. The chief step in the Scots rationale is the identification of specific implement with an obligation or decree *ad factum praestandum*. But the specific implement of contracts does not exhaust the possible membership of the set of orders *ad factum praestandum*. A thief, for example, who has made no contract with his victim owes a duty *ad factum praestandum*: to return the stolen thing to its owner. A further example of an order *ad factum praestandum* comes from old rules of court in South Africa: an order to give discovery.<sup>10</sup> Yet no contract was involved.

If specific implement is not identical to an obligation *ad factum praestandum*, two possibilities are revealed: that specific implement is a sub-set of the set of decrees *ad factum praestandum*; or that specific implement should be redefined to include other kinds of decree based on contract. The first possibility would end the discussion: *cadit quaestio*. The second would permit one to include actions and orders for the payment of an agreed money sum, a sub-set of the set *ad pecuniam solvendam*. In the modern South African case of *Farmers' Co-operative Society v. Berry Innes J.* did not distinguish between obligations *ad pecuniam solvendam* and obligations *ad factum praestandum* when he affirmed the plaintiff's *prima facie* right to specific performance, but simply referred to obligations under the contract.<sup>11</sup> And in *Gokal v. Moti and Another* Centlivres J.A. for the majority held: "Appellant sued respondents for specific performance."<sup>12</sup> The appellant seller sought to compel performance of the buyer's obligations under the sale of a business. The judge later held that "the appellant is entitled to an order for specific performance. ... [J]udgment is entered directing the respondents:- ... (c) to make payment in terms of Clause 5 of the contract of July 15th, 1939, and to provide the security therein mentioned."<sup>13</sup> Clause 5 concerned the purchase price and the security for payment.<sup>14</sup> Other decisions that specific performance can include obligations *ad pecuniam solvendam* are *Myers v. Abramson*;<sup>15</sup> *Carpet Contracts (Pty.) Ltd. v. Grobler*;<sup>16</sup> *Louw v. Nel*;<sup>17</sup> and *Jacobs v. United Building Society*.<sup>18</sup> Further, section 19(4) of the Alienation of Land Act 1981 mentions the seller's right to sue for specific

performance.<sup>18</sup>

Once the remedy is held to include obligations for the payment of money, by necessary implication the court, as in all cases of specific performance, has a discretion to refuse it for sufficient reasons. Actions for payment of contractual sums have been refused in *Manasewitz v. Oosthuizen*;<sup>20</sup> *South African Harness Works v. South African Publishers Ltd.*;<sup>21</sup> and *Carpet Contracts*. Criticism of the reasons for refusal in some cases<sup>22</sup> does not imply that the courts lack the power of discretion. D.J. Joubert avers that in actions for payment of money the court has no discretion to refuse the remedy.<sup>23</sup> His reference to *Industrial & Mercantile Corporation v. Anastassiou Bros.*<sup>24</sup> does not help him: there Davidson J. quoted *Berry and Haynes v. Kingwilliamstown Municipality*,<sup>25</sup> both of which decided that courts hearing actions for specific performance do have a discretion. Joubert's other reference is the old case of *Smith & Warren v. Harris*: Laurence J.P. did hold that there was no reason in law or equity for not enforcing the vendor's action *ad pecuniam solvendam*.<sup>26</sup> The short criticism of this judgment is that it was delivered before those about the court's discretion in *Berry, Haynes*, and now *Benson v. S.A. Mutual Life Assurance Society*.<sup>27</sup>

Were specific implement redefined to include obligations for payment of contractual sums, imprisonment would no longer be the sole compulsitor or section 4 of the 1880 Act a bar. In the South African Supreme Court, orders *ad pecuniam solvendam* are enforced by a writ of execution against the judgment debtor's property.<sup>28</sup> In general, they are not enforced by attachment of the debtor's person; exceptions, however, are the order that an executor should pay costs *de bonis propriis*, and the order for payment of matrimonial maintenance-- disobedience is punishable by committal for contempt of court.<sup>29</sup> A magistrates' court, however, by what Baker J.<sup>30</sup> has called an anomaly, "may lawfully commit a judgment debtor for failure to pay a commercial debt."<sup>31</sup> ... Moreover, by ... s 65M of the [Magistrates' Courts] Act, a magistrates' court may order the committal of a judgment debtor for failure to pay a judgment debt arising from a Supreme Court judgment to pay any amount of money."<sup>32</sup>

To avoid breaking section 4 of the Debtors (Scotland) Act 1880, a Scots court might adopt the above general rule on execution of orders *ad pecuniam solvendam* from the South African Supreme Court, and reject the exceptions as to committal of the judgment debtor for contempt of court. Redefining the decree for specific implement to cover decree for payment of the agreed money sum would mean that this kind of decree would be enforceable by various diligences: against the debtor's corporeal moveables, by poinding and sale, real poinding, sequestration, or maills and duties; against his

corporeal or incorporeal moveables, by arrestment in execution and action of furthcoming; and against his heritage, by adjudication for debt. What purpose would redefining specific implement serve? The defender to an action for payment of the agreed money sum could argue that the court, applying principles of specific implement, should exercise its discretion to refuse the remedy in cases such as *White & Carter (Councils) Ltd. v. McGregor*.<sup>33</sup> In *Salaried Staff London Loan Co. Ltd. v. Swears and Wells Ltd* (1985) the First Division virtually carried out this redefinition of specific implement.<sup>34</sup> The pursuers concluded for payment of rent due, the defenders having committed anticipatory repudiation of a lease with twenty-nine years still to run. *White & Carter (Councils) Ltd.* was applied, as one would expect: but so were *Stewart v. Kennedy* (a case about specific implement)<sup>35</sup> and *Grahame v. Magistrates of Kirkcaldy* (which concerned interdict).<sup>36</sup> The defenders were held not to have averred reasons which would justify the court in exercising its discretion to refuse the pursuers' legal remedy of claiming implement of the contract; so the pursuers won. The boundaries between specific implement and the action for payment of an agreed sum were not sharply drawn; section 4 of the 1880 Act went unmentioned; and the Lord Ordinary (McDonald) and all three members of the First Division (Lord President Emslie and Lords Cameron and Ross) referred to Lord Watson's famous passage in *Stewart*<sup>37</sup> on the Scots pursuer's general right to specific implement. It will be interesting to watch out for the case in which the defender to an action for payment of the agreed money sum does aver and prove grounds justifying the exercise of the court's equitable discretion. Until then, we shall be technically correct in defining an action for specific implement as a claim for the actual performance of the defender's contractual obligations to do an act, or to consign money,<sup>38</sup> or to take up and pay for company debentures.<sup>39</sup> In South Africa, an action for specific performance is for actual performance of the defendant's contractual obligation, whether to pay an agreed money sum or to do an act.

I should also explain what I mean by the statement that specific implement (or performance) is "the primary remedy" in Scots and South African law. Romero<sup>40</sup> identified three different meanings of this expression: "it may be used in a doctrinal sense, as a 'policy preference' or in a statistical sense."<sup>41</sup> In the doctrinal sense a primary remedy is available as a general rule admitting exceptions.<sup>42</sup> It is a policy preference if it is "not undermined by its numerous exceptions and by the other rules in the system to such an extent that it can no longer be said to be favoured by the rules of a particular system."<sup>43</sup> And it is primary in the statistical sense<sup>44</sup> if



in cases of litigation for breach of contract, a certain remedy is the one most frequently requested by plaintiffs or awarded by the courts. Even if we conclude that all the substantive, remedial, procedural and enforcement rules of a legal system taken as a whole favour a certain result, it may be that such result is not the one most frequently achieved in practice, because of disincentives, costs, externalities or practical considerations which lead the parties to a form of behaviour different from that favoured by the legal system.

I have not analysed the statistical primacy of specific implement or South African specific performance. But in the minute books of the Court of Session lodged in West Register House, the description "payment" is by far the commonest; "specific implement" or "implement" is comparatively rare. "Payment" is a general word: not every decree would, of course, be for payment of an agreed sum, or even of contractual damages; but the sheer number of entries leads me to believe that specific implement is not the primary remedy in the statistical sense-- unless it were redefined so as to include the action for payment of an agreed money sum, whereupon the statistics of the ratio between specific implement and the other contractual remedy which is the primary one in English legal theory, damages,<sup>45</sup> might alter dramatically. I recommend that analysis to a lawyer with a taste for statistics. However, I shall use the expression "primary remedy" in its first and second senses.

#### Notes

1. T.B. SMITH, *STUDIES CRITICAL AND COMPARATIVE* 46 (1962).
2. *Id.*, 56.
3. *Id.*, 57.
4. *Id.*, 59.
5. *Id.*, 61.
6. Van Warmelo, 1959 *ACTA JURIDICA* 84.
7. 6 W. HAZLITT, *Essay V: The Same Subject Continued* [i.e., *On Genius and Common Sense*] in *COLLECTED WORKS* 42, 43 (A.R. Waller and A. Glover (eds.), 1903).
8. *White & Carter (Councils) Ltd. v. McGregor*, 1962 S.C. (H.L.) 1, esp. the dissenters' judgments: *Ld. Morton* at 16; *Ld. Keith* at 20. *See, also*, T.B. SMITH, *A SHORT COMMENTARY ON THE LAW OF SCOTLAND* 854 (1962); W.M. GLOAG, *THE LAW OF CONTRACT* 655 (1929); D.M. WALKER, *THE LAW OF CIVIL REMEDIES IN SCOTLAND* 281 (1974); D.M. WALKER, *THE LAW OF CONTRACTS AND RELATED OBLIGATIONS IN SCOTLAND* 542 (1985); W.W. McBRYDE, *THE LAW OF CONTRACTS IN SCOTLAND* 511 (1987).

9. (43 & 44 Vict. c. 34). The period of imprisonment for wilful disobedience to a decree ad factum praestandum is now six months at most: section 1, Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (3 & 4 Geo. 6 c. 42).
10. J. HERBSTEIN & L. de V. VAN WINSSEN, THE CIVIL PRACTICE OF THE SUPERIOR COURTS IN SOUTH AFRICA 653 n. 31 (3d ed., 1979).
11. 1912 A.D. 343, 350: quoted *infra* page 70.
12. 1941 A.D. 304, 309.
13. *Id.*, 315.
14. *Id.*, 308.
15. 1952 (3) S.A. 121 (C) 126G *per* Van Winsen J. (employee's claim for wages).
16. 1975 (2) S.A. 436 (T) 442C-D *per* Viljoen J., declining to follow Innes C.J. in *Dennill v. Atkins & Co.* 1905 T.S. 282, 287. Innes C.J.'s words were, I submit, implicitly overruled by his judgment in *Berry*, where he did not distinguish the obligation to pay the agreed money sum as an exception to the general rule.
17. 1977 (3) S.A. 499 (W).
18. 1981 (4) S.A. 37 (W) 39D *per* Nestadt J.: "Where a creditor under a contract in terms whereof payment of a sum of money is due sues for it, this is a claim *par excellence* for specific performance."
19. No. 68 of 1981.
20. 1914 C.P.D. 328.
21. 1915 C.P.D. 43.
22. *See, e.g.* J.C. DE WET & J.P. YEATS, KONTRAKTEREG EN HANDELSREG 190 n. 63 (4th ed., 1978) on *Manasewitz*.
23. D.J. JOUBERT, GENERAL PRINCIPLES OF THE LAW OF CONTRACT 222 and n. 3 (1987).
24. 1973 (2) S.A. 601 (W).
25. 1951 (2) S.A. 371 (A).
26. (1888) 5 H.C.G. 193, 196.
27. 1986 (1) S.A. 776 (A).
28. 3 W.A. JOUBERT (ed.), THE LAW OF SOUTH AFRICA para. 357, paras. 361-90; HERBSTEIN & VAN WINSSEN, CIVIL PRACTICE ch. 38 esp. 597-9.
29. *Hofmeyr v. Fourie* 1975 (2) S.A. 590 (C) 594A-C; 3 JOUBERT, THE LAW OF SOUTH AFRICA para. 357.
30. *Hofmeyr*, 1975 (2) S.A., 600G.
31. Section 65F, Magistrates' Courts Act No. 32 of 1944.
32. 1 P.S.T. JONES & H.O. BUCKLE, THE CIVIL PRACTICE OF THE MAGISTRATES' COURTS IN SOUTH AFRICA 202 (7th ed., 1980).
33. 1962 S.C. (H.L.) 1. *Compare* the argument by A.J. KERR, THE PRINCIPLES OF THE LAW OF CONTRACT 382-5 (3d ed., 1980).
34. 1985 S.L.T. 328 (1st Div.).
35. 1890, 17 R. (H.L.) 1.
36. 1882, 9 R. (H.L.) 91.
37. 1890, 17 R. (H.L.), 10-1, quoted *infra* pp. 66-7.

38. Mackenzie v. Balerno Paper Mill Co., 1883, 10 R. 1147 (1st Div. and consulted judges).
39. Section 195, Companies Act 1985 (c. 6). Beardmore & Co. v. Barry 1928 S.C. 101 (2d Div.); 1928 S.C. (H.L.) 47.
40. Romero, 27 LES CAHIERS DE DROIT 785, 792-4 (1986).
41. *Id.*, 792.
42. *Id.*, 792-3.
43. *Id.*, 793.
44. *Id.*, 794.
45. Stewart v. Kennedy, 1890, 17 R. (H.L.), 9-10 *per* Ld. Watson, 5 *per* Ld. Herschell, 11 *per* Ld. Macnaghten; Harnett v. Yielding, 2 Sch. & Lef. 549, 553 (1805) *per* Ld. Redesdale L.C.I.; Wilson v. Northampton and Banbury Junction Railway Co. (1874) 9 Ch. App. 279, 284 *per* Ld. Selborne: "The Court gives specific performance instead of damages only when it can by that means do more perfect and complete justice." The plaintiff bears the *onus* of proving the inadequacy of the legal remedy: The Stena Nautica (No. 2) [1982] 2 Lloyds Rep. 336, 348. On the rule about inadequacy of damages, *see* R.J. SHARPE, INJUNCTIONS AND SPECIFIC PERFORMANCE 270 ("The adequacy of damages test remains the primary one in determining the availability of specific relief....") *et seq.*; I.C.F. SPRY, EQUITABLE REMEDIES 59-69 (3d ed., 1984); R.P. MEAGHER, W.M.C. GUMMOW, & J.R.F. LEHANE, EQUITY 475-8 (2d ed., 1984); G. JONES & W. GOODHART, SPECIFIC PERFORMANCE 18-22 (1986); G.H. TREITEL, THE LAW OF CONTRACT 785-9 (7th ed., 1987).

In *Beswick v. Beswick* [1968] A.C. 58 the House of Lords ordered the nephew to pay his uncle's widow £5 a week, as he had promised his uncle. As regards this decision, Burrows, 4 LEG. STUDS. 102, 105-7 (1984) points to a narrow interpretation in which the traditional views of damages adequacy were applied and the damages were found nominal and inadequate to meet the justice of the case (*per* Ld. Upjohn at 102); and a wider interpretation based particularly on Ld. Pearce's speech (at 91), quoting Windeyer J. in *Coulls v. Bagot's Executor and Trustee Co.* (1967) 119 C.L.R. 460, 503 (H.C. Aus.), that specific performance should be granted where it is the more appropriate remedy. *Beswick* was hailed by F.H. LAWSON, REMEDIES OF ENGLISH LAW 223-4 (2d ed., 1980): "it is not unreasonable to see in it an acknowledgement of a right to specific performance of all contracts where there is no adequate reason for the courts to refuse it. If this is so, we have already in England reached the Scottish principle that specific performance is the normal remedy for breach of contract, and a refusal of it must be justified in specified types of case or on special grounds. In other words ... the choice between specific performance and damages should in principle rest with the plaintiff, not the court...."

*Beswick* did open the way to a more flexible approach towards specific performance; but later judgments in areas such as the sale of goods show that specific performance is still far from being an ordinary legal remedy in English law, still less the primary remedy in the doctrinal sense of the general rule with exceptions, or the policy preference. McKendrick, 1986 S.L.T. (News) 249 has argued for the substantial similarity of the Scots and English remedies of specific enforcement of contracts. Some similarities do exist; yet, by considering Scots law particularly on the specific implement of the sale of goods, I hope to show that the Scots remedy is different from the English, and more comparable with South African specific performance, the law on which has recently been restated in terms

distancing it from the English notion of damages adequacy and certain resultant categories of exceptions to the general availability of specific performance in South Africa. In determining whether specific enforcement is the doctrinal general rule and the policy preference of a legal system, one may use as a touchstone the question: "How far does the system allow specific enforcement of a sale of ordinary goods?"

**PART I**

## Chapter 1: A Sketch of the history of specific implement

### The Secular Courts

I do not attempt detailed analysis of the history of specific implement, for my interest lies in the modern law, but merely adumbrate the possible age of the remedy.

Two kinds of brieve in the old Scots collections may bear on the topic: the *compulsio* and the *conventio*. The *compulsio* directed the addressee, whether sheriff, justiciar, Steward of Scotland, or burgh magistrates, to compel the defender;<sup>1</sup> and the majority of specimens indicate the purpose to be the payment of debt.<sup>2</sup> "Failure to pay debt," said McKechnie, "was covered by the diligence brieve of *compulsio*, but this was probably limited to debts already constituted."<sup>3</sup> If by "this" he meant "*compulsio*", then his view would appear too narrow, because the *compulsio* was also available for compelling witnesses to attend court and give evidence, in terms which do not express any liability for paying debt, whether constituted or otherwise.<sup>4</sup> Further, *compulsio* lay *ad compellandum heredem ad observandum rationabiles convenciones patris sui*.<sup>5</sup> not every single *convencio* by the father could have bound him to pay money only. Besides, there was a different form of *compulsio*-- *heredis pro debito patris sui defuncti*<sup>6</sup>-- for recovering the debtor's debt from his heir: and the difference in wording suggests a difference in function and purpose. The Bute Manuscript, a later production, contains an even broader *compulsio*.<sup>7</sup>

*Litera compulsionis de convencionibus generaliter observandis.* (Brieve to the sheriff for the enforcement of specific implement of agreements concluded between two named parties-- "... *ad observandum et perficiendum juste et sine dilatione rationabiles convenciones inter ....*")

The *breve de conventione*, which McKechnie thought had developed from that of *compulsio*,<sup>8</sup> is alluded to in chapter 49 of *Quoniam Attachiamenta*<sup>9</sup> and appears in chapter 50:<sup>10</sup>

Tali processus est faciendus in brevi de conventione, cujus haec est forma.-- Rex [justitiario], vice-comiti, [praepositis], salutem. Mandamus vobis et praecipimus quatenus juste compellatis talem, filium et heredem quondam talis, ad observandum et perficiendum juste et sine dilatione tali rationabiles convenciones factas inter dictum quondam talem patrem ipsius talis ex parte una, et talem ex parte altera super tali re, secundum quod ipse talis, vel certus actornatus, lator praesentium, dictum talem dicti quondam talis patris sui heredem, ad dictas convenciones juste teneri et ad ipsum juste debere

pertinere rationabiliter probare poterit coram vobis; ita quod pro defectu vestro amplius inde justam querimonium non audiamus, etc.

This extract runs in the King's name and orders the justiciar, sheriff, and magistrates to compel implement of a contract which gives no sign of being other than one of those *privatae conventiones* which the anonymous compiler of *Regiam Majestatem*, following English law, had declared not to be cognizable in the King's Court "if made out of court, or made in some court other than the King's Court."<sup>11</sup> Unless the justiciar or sheriff is regarded as being other than the King's man, the brieve in *Quoniam Attachiamenta* contradicts the exclusion in *Regiam Majestatem*;<sup>12</sup> and it is submitted that the various specimens of brieve in the Ayr and Bute Manuscripts and *Quoniam Attachiamenta* may give a more accurate picture of contemporary Scots practice. One apparent difficulty is created by the words of *Acta Parliamentorum Roberti I* 1318, where section XIV, *De modo placitandi super convencionibus*, ends by instructing the pursuer to specify "que dampna habuerit per convencionem non observatam"; specific implement is not mentioned.<sup>13</sup> As the *compulsio* and the *conventio* brieves were available for constraining the debtor's implement *ad observandum et perficiendum*-- the prospective force of the gerundives is important-- it is thought that the 1318 statute introduced the requirement of pleading damages (such as those claimed in addition to specific implement, on account of the defender's delay) but did not limit the pursuer to a damages claim which would undermine his claim as formulated in the brieve. A comparative reference to English law helps to make the point by showing how odd it would be if the Scoto-Norman *conventio* was confined to damages while the Anglo-Norman writ of covenant was the means of obtaining an order of specific performance from the King's court. As Pollock and Maitland explained:<sup>14</sup>

In later days we learn to look upon the action for damages as the common law's panacea, and we are told that the inability of the old courts to give 'specific relief' was a chief cause for the evolution of an 'equitable jurisdiction' in the chancery. But when we look back at the first age of royal justice we see it doing little else than punishing crime and giving 'specific relief.' The plaintiff who goes to the king's court and does not want vengeance, usually goes to ask for some thing of which he is being 'deforced.' The thing may be land, or services, or an advowson, or a chattel, or a certain sum of money; but in any case it is a thing unjustly detained from him. Or, may be, he demands that a 'final concord' or a covenant may be observed and performed.... Even the feoffor who fails in his duty of warranting his feoffee's title is not condemned to pay damages in money; he has to give equivalent land. No one of the oldest group of actions is an action for damages.

Damages supplementary to specific relief originated in the assize of novel disseisin; in Glanvill's time the assize resulted in specific relief, but in Bracton's the plaintiff received the land and compensation for the wrong.<sup>15</sup>

Covenant therefore lay for a broad range of obligations, as corroborated by the Statutum Walliae 1284.<sup>16</sup> For example, it provided the means of compromising actions in a final concord or fine, a settlement recorded in a document called a chirograph. After recitation in the King's court, it was split between the parties<sup>17</sup> and for breach of its terms there was the action on the concord, for specific performance and, if that remedy was not possible, only then for damages.<sup>18</sup> *Regiam Majestatem* 1.27 summarizes with slight changes the Glanvillian procedure for haling the concord-breaker before the court.<sup>19</sup> In time the English action on the concord became collusive, a handy mode of conveying land; the Scots version, though, still settled a true dispute.<sup>20</sup> But since the Scots court interposed its authority-- "Praefati iudices auctoritatem suam interposuerunt"<sup>21</sup>-- to the settlement, breach of obligations assumed by the parties in the document would call down the court's machinery for enforcement of performance reasonable and possible. Kames<sup>22</sup> and Ross<sup>23</sup> derived from the compromise the Scots registration for preservation and execution; and the *querula de fine facto in curio non observato*,<sup>24</sup> by which non-performance of the settlement was drawn to the court's attention, may be taken as indirectly supporting the competence of specific implement.

Other examples of the English covenant are for enforcing obligations by the landlord to provide the let premises to the termor,<sup>25</sup> obligations to build a house, provide a chaplain to sing chants,<sup>26</sup> do repairs on the let premises,<sup>27</sup> and perform personal services.<sup>28</sup>

In England the action subsequently entered a period of circumscription and decline. Though it was available in the local courts without undue requirements of form,<sup>29</sup> early<sup>30</sup> .

in the fourteenth century the king's courts finally decided that they could not entertain any ordinary action of covenant unless the plaintiff produced a document in which the defendant had acknowledged the terms of the agreement by affixing his seal, the equivalent in a largely illiterate age of our signature. At least there could be no dispute over what was agreed, so that only performance could be in issue.

Obligations to pay money or deliver goods were covered by the more powerful writs of debt or detinue,<sup>31</sup> which from 1352 could be enforced by the robust procedure developed in the tortious action of trespass *vi et armis*, the defendant being liable to



arrest or outlawry. Covenant, by contrast, was slow.<sup>32</sup>

Specific implement in the Scottish King's court becomes more clearly discernible from the *Acta Dominorum Concilii* towards the end of the fifteenth century, when the pursuer, no longer having to fit his case into the format of a special breve, simply alleged the defender's wrongful act or omission and left the remedy to the court.<sup>33</sup> Walker<sup>34</sup> selected actions and decrees of implement in which defenders were ordained to

quit lands, deliver a tack, or pay damages ...;<sup>35</sup> to implement a marriage-contract ...;<sup>36</sup> to give sasine of land, or pay money ...;<sup>37</sup> to find a priest to sustain a chaplainry for the soul of Robert Bruce's father, or pay 200 merks for failure ...;<sup>38</sup> to implement a charter party....<sup>39</sup>

There were also decrees ordaining the conclusion of marriage;<sup>40</sup> delivery of money<sup>41</sup> and land;<sup>42</sup> and the heritable infeftment of the pursuer.<sup>43</sup>

To these examples may be added others in which defenders had to settle heritable subjects in liferent and fee;<sup>44</sup> execute and deliver a formal tack;<sup>45</sup> procure from a grandfather a conjunct infeftment for spouses;<sup>46</sup> cede possession and enter a tenant;<sup>47</sup> implement a warrandice of lands;<sup>48</sup> infeft in an annualrent, as a burgh court had already decided;<sup>49</sup> and implement a sale by accepting French wine delivered to Ayr by foreign sellers.<sup>50</sup> Finally, there was *Countess of Crawford v. Achilmere of that Ilk* in 1482.<sup>51</sup> The countess sued as assignee of Gawine Hammiltoun, James Lord Hammiltone's executor, because Achilmere wrongfully withheld certain "scheip, woll, lammys, gerse, male and uther gudis contenit in ane indentur made thairrupon...." The Lords in the defender's absence ordained payment of

viiij<sup>c</sup> yowis and viij<sup>c</sup> yeld scheip of sufficient gudis, nane of thame hoggis of clippit scheip, and sevin sek of woll gude and sufficient merchand ware without ter, cot or eik, and viij<sup>c</sup> skore of lammis [sevintene skore of stanis of chese (*deleted*)], and xiiij li of mone, as is at lenth contenit in ane indenture....

### The Church courts

Besides the royal courts, those of the church would intervene, even in contracts between laity, where the parties had sworn an oath (*interpositio fidei*) to fulfil the agreement which one of them subsequently broke.<sup>52</sup> As Helmholz explains:<sup>53</sup>

The Church's general jurisdiction over the sins of laymen gave rise to this litigation. It was a sin to violate one's sworn promise. And the canon law held that one could be obliged, under pain of excommunication, to complete his promise. There was controversy among canonists about whether a simple promise, *nudum pactum*, gave rise to an action. But a sworn undertaking was always understood to be enforceable by the ecclesiastical censures the Church courts had at their command.

The gloss *licet* in *Sext.* 2.11.2 epitomized the jurisdiction: "Nota finaliter quod quis praecise compellitur servare iuramentum licitum et obligatorium."<sup>54</sup> Helmholz gives as the basic texts for this jurisdiction *C.* 22. *q.* 5 *c.* 12; *X.* 1.35.1.; *X.* 2.14.35.; *Sext.* 2.2.3. and *Sext.* 2.11.2.<sup>55</sup> The second has the famous rubric, "Pacta quantumcunque nuda servanda sunt." This echoes Justinian's *C.* 2.3.29.; the idea is even older, for Plato's Socrates inquires, "Ought one to fulfil all one's agreements, provided that they are right, or break them?" and Crito answers, "One ought to fulfil them."<sup>56</sup> The background to the passage in the *Decretals* was that in 348 two North African bishops made a pact demarcating their parishes; Antigonius complained that some of his flock had then been enticed away by Optantius. The Council of Africa in Carthage held: "Pax servetur, pacta custodiantur." On a plain reading *X.* 1.35.3., "Studiose agendum est, ut ea, quae promittuntur, opere compleantur", justifies specific performance of all agreements, whether or not fortified by oath; yet canonists disagreed on whether the *obligatio dandi*, *tradendi*, and *faciendi* were specifically enforceable. Dilcher<sup>57</sup> quoted passages indicating that, as regards the first kind of obligation, Bernard of Parma and Panormitanus supported the remedy; and as regards the second (the seller's obligation to deliver), Bernard of Pavia, Bernard of Parma, Johannes Andreae, Johannes de Imola, and Felinus Sandeus supported the remedy, Hostiensis opposed it in favour of damages, Durantis vacillated, and Panormitanus followed Bartolus in distinguishing the obligation to deliver *ex causa emptionis* from the obligation to deliver arising from other causes. As regards the third kind of obligation, *faciendi*, Durantis supported the remedy. Panormitanus affirmed the direct compulsion of sworn *obligationes faciendi*. Even for unsworn *obligationes faciendi* he allowed specific performance; and he distinguished civilian from canon law. Otherwise he would have contradicted himself on the subject of obligations to deliver which arose from causes other than sale.

The text in the *Decretals of Gratian*, *C.* 22. *q.* 5 *c.* 12,<sup>58</sup> where St John Chrysostom had said, "Inter iuramentum et locutionem fidelium nulla debet esse differentia", with references to the Sermon on the Mount in *Matthew* 5:34-7; *Wisdom* 1:11; and *Proverbs* 14:5, was used to soften the distinction between *nuda pacta* and *vestita pacta* and overcome the Roman maxim *ex nudo pacto non oritur actio* (*D.*

2.14.7.4.; D. 19.5.15.), so that by "the end of the fourteenth century the view that an action arises from a *nudum pactum* has become the *communis opinio canonistarum*, though its full application is held to be restricted to clerks and to laymen who are under the temporal jurisdiction of the church."<sup>59</sup>

Also worthy of note was the church's willingness to persuade and compel engaged parties to fulfil their *sponsalia*, under X. 4.1.2. and 10. Hay's *Lectures on Marriage* states the relevant law.<sup>60</sup> That Scots were not necessarily compelled to marry if intercourse had not occurred is shown by *Symson et Smyth*; *Loch et Zoung*; and *Blak et Robertson* from the early sixteenth century.<sup>61</sup>

In the church court the aggrieved party claiming specific enforcement of the contract fortified by oath used the *denunciatio evangelica*, named after the procedure laid down in *Matthew* 18:15 to 17.<sup>62</sup> The disobedient oath-breaker was threatened by the court with the various ecclesiastical punishments: their stages were listed by Ollivant as interdict forbidding entry into church, suspension from divine rights, excommunication, aggravation, reaggravation, and interdict:<sup>63</sup>

The effect of excommunication was to cut off the excommunicate from the sacraments of the church. ... [A]ggravation seems to have been a warning of more serious penalties to come. ... [R]eaggravation ... was designed to isolate the excommunicate from all christian society. ... Anyone disobeying this would themselves suffer the pains of excommunication. ... [Interdict], the final and most far-reaching curse of all ... transformed the social outcast into a leper who spread the symptoms of his own damnation as he travelled.

Interdict meant that church activity should cease until three days after the excommunicate had left the area. Luther thought this stifling of God's word a "greater sin ... than killing a priest or keeping back some church property."<sup>64</sup>

Helmholz identified four themes, sometimes contradictory, in the medieval canonists' theory of excommunication as a legal sanction:<sup>65</sup>

First, they regarded it as the most serious sanction of the canon law, one not to be invoked lightly. No more weighty sentence lay at the disposal of ecclesiastical tribunals. Second, it was ... medicinal, rather than punitive.... [,] to cure a spiritual disease, not to aggravate one. Third, it was not a final determination. Unjust sentences of excommunication were conceivable, indeed likely, but God would always reverse an incorrect earthly judgment. Fourth, [it] should not ordinarily be used to impede the needs of society. Only in extreme cases should the effects of the sanction be carried far enough to risk upsetting public order.

Some implications may be discussed under their respective numbers.

1) Safeguards were to be provided by proper procedure, right of appeal, and careful direction at contumacious defenders only.<sup>66</sup> The partial breakdown of these in sixteenth-century Scotland appears from Friar William Arth's sermons on cursing at Dundee and St Andrews, as reported by Knox:<sup>67</sup> the measure

should not be used rashly and for every light cause, but only against open and incorrigible sinners. But now (said he) the avarice of priests, and the ignorance of their office, has caused it to be altogether vilipended; for the priest ... whose duty and office is to pray for the people, stands up on Sunday, and cries, "One has tynt a spurtill. There is a flail stolen from them beyond the burn. The goodwife of the other side of the gate has tynt a horn spoon. God's malison and mine I give to them that knows of this gear, and restores it not."

And Dunfermline drinkers had asked him: "What honest man will do the greatest service for least expenses?" and had given the answer-- the bishops and their officials.

Will they not give us a Letter of Cursing for plack to last for a year, to curse all that look over our dyke, and that keeps our corn better nor a sleeping boy, that will have three shillings of fee, a sark, and [a] pair of schone in the year?

In 1588 the idol of St Giles was thrown into the North Loch, then burned; the Bishops issued what amounted to a decree *ad factum praestandum* with a damages alternative, by ordering the Provost, Bailies, and Council of Edinburgh "either to get again the old St Giles, or else upon their own expenses to make a new image." Council refusing was admonished by the Archbishop of St Andrews under pain of cursing; appeal was raised to the Pope.<sup>68</sup> *The Book of Discipline* of the Reformed Church provided that "the order of Excommunication and proceeding to the same ought to be grave and slow" but once imposed, severely kept.<sup>69</sup>

2) Being medicinal, excommunication was not to be imposed on the poor debtor unable to pay, for it "would have served no restorative spiritual purpose";<sup>70</sup> he must swear to pay when able. Subsequently, Luther<sup>71</sup> and Calvin<sup>72</sup> inveighed against abuse of excommunication for collecting debts from the poor; a procedure tainted, in Luther's opinion, with ecclesiastical hypocrisy.

If judged medicinally ineffective, excommunication could be relaxed.<sup>73</sup> Its penal and its medicinal aspects here conflicted. "In the end [the canonists] said that [it] should serve as a lasting punishment for the truly contumacious; for others its medicinal purpose

was paramount":<sup>74</sup> a distinction which separates this ecclesiastical from modern legal sanctions through a basic difference of attitude which is consequently discernible in the English church courts' habit of allowing excommunicates to pay a small fine in penance, as Helmholz explains, rather than enduring public disgrace.<sup>75</sup>

These and other insights lead Helmholz to warn against facile answers concerning the medieval effectiveness of the measure:<sup>76</sup>

The canonists did not envision that [it] should have worked in the immediate sense of bringing all those sentenced to immediate and public obedience. The purposes of the sanction were too complex, and the exceptions to its effects too numerous and substantial for anyone to have supposed that it should have worked that way.

Lord Cooper, introducing a selection of thirteenth-century Scots cases, said that the judges delegate heard claims for specific implement or damages.<sup>77</sup> Ollivant's study of the sixteenth-century business of the court of the official disclosed actions for fulfilment of the contract, including those contracts which had been registered in the church courts' books.<sup>78</sup>

If the church court was determined to bring the contumacious defender to heel, it would apply to the King for an order directing secular officers to arrest him, as can be seen from brieves 19 to 22 in the Bute Manuscript,<sup>79</sup> and from *Paisley Abbey v. Gilbert*.<sup>80</sup> Continued defiance then impugned the authority of the King as supreme feudal superior. Ross<sup>81</sup> quoted a passage from Balfour's *Practicks* which does not appear on the stated page of the Stair Society's edition, but which Ross gives as chapter 6 of Robert III's reign in the fifteenth century:

That all justiciars, sheriffs, and others, the King's ministers, sall await upon, and answer to all letters of caption to be direct to them, be all bishops and their officials; and sall cause mak lawful execution of the samin, conform to the old form, notwithstanding any appellations or reasons alledged or preponed to the contrarie.

This appears to be the justification for Stewart's statement: "To give effect to their needs and to the decrees of their Courts, the clergy exercised the power of imprisonment which the civil judge could not do";<sup>82</sup> and Ross's, that by chapter 12 of the 6th Parliament of James II, "in imitation of the English, the direct power of issuing the caption against the person, which in Robert's time belonged to the bishop or his official, had now reverted to the Crown."<sup>83</sup> Whatever the objections to including non-payment

of debt among the causes which would call down the penalties and punishments of church and state, for decrees *ad factum praestandum* the justification was provided by Bell's words<sup>84</sup> that for

obligations to perform an act within the debtor's own power ... [,] the analogy of the imprisonment of criminals as a punishment was fairly applicable ...; since a debtor who should refuse performance of an obligation which he had undertaken, and was able to perform, was not only guilty of dishonesty very nearly approaching to a crime, but of a punishable contempt of the judicial power of the country. It was in this way that the power arose of imprisoning such a debtor, and of declaring him, by the regular forms of charge and denunciation, an outlaw, and a rebel, if he fled from punishment.

Excommunication disappeared as a punishment for breach of secular contracts after the Reformation; letters of four forms, based on disobedience to the King, were still issued and fairly soon were superseded by letters of horning in 1584, granted by the Supreme Court for its own decrees and those of lower courts to which it interponed authority. The four charges were shortened to one of fifteen days.<sup>85</sup>

#### Balfour

Balfour's *Practicks* contain some passages bearing on the creditor's right to specific implement. In the work of a man who had been Official of Lothian before becoming a Lord of Session, it is not surprising to find a note<sup>86</sup> on *Barclay v. Blakhall* (1542) that a

contract or obligatioun maid of ony civile or prophane matter, sic as ane assedatioun of landis, is understand not to be prophane or civile, gif the samin be confirmit be the aith or *fide media* of the contrahentis, or ony ane of thame; and thairfoir the partie, albeit he be a temporall man, may be callit and persewit for fulfilling of the samin befor the spirituall Juge.... Bot gif ony sic contract concernis redemptioun of landis or heritage, albeit the samin be maid be interpositioun of faith of bodie, or ane aith; nevertheles the samin is understand to be prophane, and thairfoir suld be decydit befor the Lordis of counsall allanerlie.

The centrepiece on our subject appears in the chapter "Anent interest and skaith":<sup>87</sup>

Gif ony persoun bindis and oblissis him to infest ane uther certane landis, at a certane day, and ressavis thairfoir ony gude deid, or sowme of money; gif he postponis, delayis, or refusis to do the samin, beand requirit thairto, he to quhome the said obligatioun is maid hes just richt and actioun, at his awin pleasour and will, ather to call and persew the uther partie for fulfilling of the said obligatioun, or ellis for restitutioun of the money or other gude deid

gevin thairfoir: And in baith the saidis caisis, viz. quhidder he persew for fulfilling of the obligatioun, or for the restitutioun of the money or gude deid, it is leasum to the persewar to call and persew for the coistis, damage, skaith and interest quhilk he hes sustenit throw the wanting of the said infestment, and for the avallis and proffetis quhilk he micht have had of the landis, gif he had obtenit the samin at the term contenit in the said obligatioun. *Et generaliter, si quis se facturum aliquid promittit, et non facit, tenetur ad interesse solvend.* 12 Novemb. 1561, George Reul *contra* Archibald Erle of Angus. 17 Mart. 1510, Mathou Auchinlek *contra* Johne Kinnaird, 1 t. c. 165.

Damages in addition to specific implement were thus competent; and the option was the creditor's.

Impossibility is a defence, as appears from the statement that, failing in his obligation to obtain a third party's land for the creditor, the debtor will be liable to damages and interest;<sup>88</sup> and also from the passage on diligence, noting *Reid v. Abbot of Melros* (1541):<sup>89</sup>

Bot gif he, aganis quhom thè decrete is gevin, may ony wayis fulfill the samin, or gif the samin may be easilie done be him, he sould not be releivit fra the execution thairof, albeit he offer the interest in maner foirsaid.

And Ross cites *Montgomery v. Semple* (1566) as showing that letters of relaxation to free the captive debtor would not in practice be granted without the creditor's consent.<sup>90</sup>

The consistent approach shown by the above passages is, however, unsettled by the somewhat lengthy c. 1 of the chapter "Anent buying and selling."<sup>91</sup> The statement of the law of arles permits the resiling party, in effect, to refuse performance by offering damages instead: so that the choice of remedies is the contract-breaker's. The law of arles was differently interpreted by subsequent old authorities in Scotland; and Balfour also contradicts himself within c. 1, because buying and selling cannot logically be "endit and perfytit" both by the accord and agreement and by the payment of arles. The contradiction may perhaps be resolved by the inference that the first half of the passage states that part performance blocks withdrawal by the recipient of the arles, and the second half therefore covers the forfeiture of arles when, neither side having performed, the matter is still *res integra*.

Treatments of various kinds of contract do corroborate the creditor's general right to specific implement. An arbiter, having accepted office, may be compelled to give a decision;<sup>92</sup> the landlord reserving the grassum, "to deliver a tak, and pay the interest"<sup>93</sup> and, having received arles from the lodger, "may be callit and decernit to

deliver the samin house, conform to his promise or ellis ane uther gude and convenient, for the like maill and dewtie";<sup>94</sup> the heir may be compelled to enter and resign lands.<sup>95</sup>

### Hope

Hope continues the theme of the creditor's choice of remedies. So in *Major Practicks* 2.1.7. he writes "Fund that in contractis innominatis agi potest vel ad implementum seu actione praescriptis verbis, vel actione recissoria si nos penitet contraxisse, re non sequuta quam contraximus culpa illius qui nobiscum contraxit."<sup>96</sup> Repeating Balfour, Hope's *Major Practicks* 2.3.4. runs:<sup>97</sup>

He who is bound to infest tuixt and such a day and hes receaved good deid for that effect, if being requyred he delay, the partie to whom the obligation is mad may either persew for fulfilling of the obligatione or for restitutione of the money, at his optione; and that by the attour his interesse and skaith sustained be the delay.

Balfour is also followed regarding the lessor's duty after receipt of the arles.<sup>98</sup> A man having died since binding himself to resign lands in another's favour, the heirs may be compelled to enter the claimant.<sup>99</sup>

Impossibility is a defence: "Nota be the lawes of this realme contractus qui non potest impleri in forma specifica potest impleri per aequipollens: arg. 1555 c. 37 (anent reversiones containeing taylyied mony)."<sup>100</sup> Otherwise, "Factum quod praestari ex sententia judicis specifice praestandum est, et non interesse."<sup>101</sup>

The competent diligence is summarized as follows:<sup>102</sup>

All decreitts consiste either in faciendo-- as quher the partie is ordained to doe or perform any thing to the quhilk he is obliged (e.g., to deliver evidents to infest in lands or annualrents)-- or they consist in dando, vel solvendo debito-- as to make payment of debt. The first is execut be personall executione; the latter be both personall and reall, be horning and wardeing of the debtor, be poynding of his moveable goods, and compryseing of his lands.

The importance of Balfour and Hope in the history of specific implement is that they, as a Lord of Session and as a Lord Advocate, were respectively conversant with the practice of the sixteenth and early part of the seventeenth centuries, their practicks were *aides-memoires* of the leading principles in the days before law reports in Scotland, and they link the earlier period of the law to that of the later seventeenth century, renowned for the works of the first institutional writers, Craig and Stair, who as regards specific



implement continued and widened and in part corrected the law stated by their predecessors.

### Craig

The creditor's right to choose between specific implement and damages receives quite detailed comment in two passages of the *Jus Feudale*; and other references support the idea of specific implement as an ordinary remedy for breach of contract.

Discussing creation of a novel feu, Craig says:<sup>103</sup>

There is a famous controversy much agitated among the feudists upon the question whether, in the event of the grantor changing his mind after granting an investiture, but before delivery of possession, he could be freed of his obligation to deliver on condition of payment of damages? The general conclusion is that he could not, but was compellable to implement the obligation (F.2.26.15)-- notwithstanding that, in the ordinary case, he who promises to perform is liberated from his obligation on payment of damages (D 45. 1. 72). Bartolus draws a distinction which is commonly accepted and is consistent with Scottish practice. It is this. If, he says, the promissor or vendor is in a position to make delivery, he is compellable to implement his bargain by doing so: if he is not, he is liberated from the bargain on condition that he pays damages and surrenders any rights competent to him under the bargain. With regard to the obligation of the grantor of a feu to make delivery of possession, it must be noted that what has been said above applies only to the grant of a novel feu possessed by the grantor himself up to, and at, the date of the investiture. In the case of an ancestral feu the case is different; for, while the vassal may on his own request obtain a renewal of the investiture from the superior, yet the superior-- having at the date of the renewal no possession of the feu-- incurs no obligation to deliver it.

The ultramontane approach made famous by Bartolus will be discussed below; here we may object that, as the records of the *Acta Dominorum Concilii* show, the liability to specific implement was wider than suggested by this passage, which is correct so far as it goes: we have seen, for example, that the buyer of wine might face an action for specific implement. Impossibility of performance results in decree for damages in lieu of implement.<sup>103</sup>

The second major passage comes in the chapter on public sale or apprising and adjudication. "If the debtor's obligation is to perform something or to deliver something<sup>104</sup> and the obligation has not so far been liquidated in money, it is competent to apply to the Court of Session for what are known as letters of the four forms,"<sup>105</sup> which successively warn the defender to perform his obligation or face imprisonment and then proclamation as rebel and therefore outlaw, at the creditor's

instance. The rebel's moveables escheat to the fisc; from their value the creditor is paid in satisfaction.

To protect himself from outlawry, the debtor must convince the court not to issue the proclamation; or must offer payment of and find caution for whatever sum the court may determine the equivalent of performance. Once the creditor has valued the performance, and the court has fixed the sum, apprising the debtor's estate-- "should that be necessary"-- becomes possible; the course which diligence will take, we infer, is still decided by the creditor.

The creditor holding an illiquid decree for performance may apply to have the court liquidate it and authorize judicial sale of the debtor's estate.<sup>106</sup> No longer need creditor and court wait for the *squalor carceris* to overwhelm the defiant debtor reconciled to lengthy imprisonment. "[T]he law looks on the rights of creditors with favour."<sup>107</sup>

An exposition which begins with "the debtor's obligation ... to perform something or ... deliver something", proceeds to show whose hand drives the wheels of justice, and draws to a close with a statement which, by approving the final step of diligence must logically approve the preceding application, the letters of four forms, and the obligation to perform or deliver, not only establishes that the creditor's right to choose and enforce specific implement rather than damages is wider than *J.F.* 2.2.22. allows, but also, by the description of Scots procedure, supports principle with practice so as to confirm specific implement as the primary remedy in Scotland, at least from the seventeenth century onwards.

Other passages supporting the view that specific implement was an ordinary legal remedy are *J.F.* 2.7.1.<sup>108</sup> and *J.F.* 2.8.43.,<sup>109</sup> on the vassal's right to compel infeftment in the estate by the superior; *J.F.* 2.6.25.,<sup>110</sup> on the reversing vassal's right to compel infeftment; and *J.F.* 2.10.6.,<sup>111</sup> on the right of the tenant named second in a tack to compel delivery thereof from the first-named tenant. If the superior does not infeft him, the vassal may petition the King for an order directed at the superior, who, if remaining obdurate, loses his superiority for life.<sup>112</sup> An heir may be compelled to give investiture to the vassal who had demanded infeftment from the subsequently-deceased ancestor.<sup>113</sup>

An "agreement to grant a tack or rental-right is the same thing as a tack. It follows that an agreement to grant a tack will secure the tacksman with whom the agreement is made against removal by the owner as effectually as the tack itself, if completed, would have done."<sup>114</sup> Only if the agreement could be enforced specifically

would this passage make sense. And if two successive investitures are granted to separate grantees, and "priority of possession is not proved, or if neither grantee has in fact obtained it, the holder of the prior title is preferred."<sup>115</sup> As Scholtens has observed in the context of double sales, the relevance of the maxim *qui prior est tempore potior est iure* depends on the competence of specific performance.<sup>116</sup>

### Stair

Stair's favourable attitude towards specific implement is to be gathered from one direct passage and others indirectly corroborative. The *locus classicus* is *Institutions* 1.17.16.:

The next effect of delay is that the interest or damage of the creditor; for if the obligation is performed within the due time and in due manner, there is no interest; if not, after the delay incurred by requisition or term, it is in the creditor's option to pursue for performance, or for damage and interest. ...

This is a general rule *locum facti imprestabilis subit damnum et interesse*, yet in some cases if the delay be wilful or fraudulent, that the thing might become imprestable, all personal execution by escheat and caption will proceed. Interest may either be competent for the whole obligation as when it is imprestable, or when any part or qualification is unperformed for the value thereof. ... In obligations which are not *in dando* but *in faciendo*, the common opinion of the doctors is, that there can be no pursuit for performance, but only for interest; for before the delay there is no pursuit, and after, the creditor cannot pursue for performance, but for interest, *l. 13. in fine ff. de re iudicata* [D.42,1,13]; but it seems more suitable to equity, that it should be in the creditor's option even after the delay, either to suit for performance or interest, as he pleaseth, if both be prestable.

In obligations *in dando*, where there is delay incurred, it will not be purged by offering performance, especially if the thing have a certain definite season of its use, as grain of such a year, if it be not delivered *debito tempore*, the delay will not be purged by offering it after, but the price comes in place of it.

That the creditor is entitled to prevent the debtor from choosing between actual, possible performance or payment of damages appears from the definition of obligation, which is<sup>117</sup>

that which is correspondent to a personal right, which hath no proper name as it is in the creditor, but hath the name of obligation as it is in the debtor: and it is nothing else but a legal tie, whereby the debtor may be compelled to pay or perform something, to which he is bound by obedience to God, or by his own consent and engagement. Unto which bond the correlate in the creditor is the power of extraction, whereby he may exact, obtain, or compel the debtor to pay or perform what is due....

The debtor "may be necessitate or constrained to pay or perform something."<sup>118</sup> Though liberty "ariseth from the principle of freedom, that man hath of himself and of other things beside man, to do in relation thereto as he pleaseth, except where he is tied by his obedience and engagement....",<sup>119</sup> "our engagements do commonly import a diminution of our personal liberty, but much more, of that natural liberty of things without us. Whence it is, that the law alloweth personal execution or restraint, and incarceration of the debtor's person, until he do all the deeds which are in his power for the satisfaction of his creditor."<sup>120</sup> Such liability to constraint can be set against the freedom with which, by the civil law and the Scots law, either party to a contract of espousals is entitled to repent and renounce.<sup>121</sup>

The third party in whose favour a *ius quaesitum tertio* has been duly constituted by two contracting parties "may compel either of them to exhibit the contract, and thereupon the obliged party may be compelled to perform."<sup>122</sup>

Any person claiming reciprocal performance of a bilateral contract must fulfil his part or have it fulfilled.<sup>123</sup> Although Scots courts had seldom had to decide whether payment of earnest money on a contract filled an evidentiary function of distinguishing negotiation from concluded contract, or else permitted withdrawal from the contract not only to the payer content with forfeiture but also to the recipient who refunded double the sum, Stair preferred the former view.<sup>124</sup> Thus he differed from Balfour as to the law of arles. Stair's consistent approach to the general rule that a creditor could not be fobbed off by a defaulter's offering money rather than performance can likewise be seen in the treatment of penalties: "in alternatives *electio est debitoris*, but the adjection of a penalty or estimation, makes not the obligation alternative."

### Mackenzie

Mackenzie's *Institutions*, though on a smaller scale than Stair's, maintains a similar approach to specific implement, in so far as general principle is illustrated by the obligations arising from the master contract, sale:<sup>125</sup>

And thus, how soon two parties agree concerning the price of any thing that is to be sold, that contract is by mere consent so far perfected, that the buyer hath the seller precisely obliged to deliver the thing bought, and perfect the sale, albeit the *dominium* or property be not transferred, but remains with the seller until delivery.

The adverb "precisely" is important: as will be shown below, the civilian version of specific performance on the Continent developed over several centuries, largely as the

result of differing answers to the question "Venditor an praecise teneatur rem venditorem emptori tradere, si rem habet, an vero liberatur praestatione eius, quod interest?" The first half of the question seems to have been translated into an affirmative paraphrase by Mackenzie when he stated Scots law.

Obligations, he continued, must refer to performances possible, lawful, and honest: "when the performance of obligations becomes imprestable, the party is liable for the value, as damage and interest, yet in these the value is not due, nor will he be liable in a penalty in a case of non-performance."<sup>126</sup> The possible is, we infer, specifically prestable. A variation on the theory of the possible is the case where the obligor undertakes something beyond his power, "as to cause another [to] dispo[n]e lands: and if he fail, he will be liable *per damno et interesse*, or for the penalty."<sup>127</sup> Behind these words lies the implication that the obligor must first have tried persuading the third party to perform.

### Bankton

Some passages of Bankton's *Institute* may give the impression that damages rather than specific implement are the competent remedy for breach of contract. So in *Inst.* 1.4.21., about the mutual considerations or obligations, the aggrieved party may claim declarator of freedom from the contract or if "determined to stand by the contract may sue the other for damages, occasioned through his not implementing the contract upon his part." Conjunct debtors among whom an obligation *faciendi* such as construction cannot be divided are liable for damages.<sup>128</sup> Impossibility is discussed as follows:<sup>129</sup>

It is a rule in law, "That, where the obligation to a fact becomes imprestable, or cannot be performed, Damage and Interest succeeds in place of it" *Locum facti impraestabilis subit damnum et interesse*. And because the liquidation of *that* is difficult, and the amount uncertain, therefore it is adviseable (says the Emperor Justinian) to make provision in the contract, that, in case the obligation is not performed, a sum shall be due in lieu of it: but if a penalty is adjoined By and Attour (*i.e.* besides) performance of the fact, it is restricted to the party's damage thro' non-performance: this is commonly the form with us; but when that is not done, and the party cannot, or will not perform, the other may insist on a declarator to get free of the contract; and, if performance is not made on or before a day limited for that purpose, a decree liberating him will proceed accordingly, or he may insist for damage and interest for non-performance.

The last part of the paragraph might be interpreted as conceivably supporting the competence of what a South African judge called the "double-barrelled relief": where the

claim is for specific implement (performance), failing which, damages.<sup>130</sup> Yet Bankton goes only so far as providing for a declarator of cancellation effective after a certain date. The idea that, at the end of the period set by the court, the pursuer might still insist for implement, supported if necessary by imprisonment for contumacy, is absent from Bankton's contemplation. And in *Inst.* 1.23.82. the seller who does not deliver grain will be liable in damages.

Other passages, though, are more positive towards the creditor's choice of enforcing specific implement. *Inst.* 1.19.37., for example, states: "The buyer has an action against the seller to compel him to fulfil his bargain, by putting the buyer in possession of the subject, and making over to him all the intermediate profits ... [W]hoever insists in his action, must first perform his own part."<sup>131</sup> *Inst.* 1.20.9. states: "The Conductor or Hirer has action against the Letter, to oblige him to perform the work or service, or give the use of the thing...." "By the civil law," says *Inst.* 1.23.14., "arbiters may be compelled to pronounce sentence, and, by our custom, when they subscribe an acceptance, but still they may excuse themselves, upon reasonable grounds." On the legal position of the parties submitting to the arbiter's decision,<sup>132</sup> if

the submission bear, That the parties shall obtemperate the decree, under a penalty By and Attour, *i.e.* Besides, performance, it is plain, none of them can be free on payment of the penalty; but, where a penalty is subjoined, without these words, there may seem difficulty: if there is no penalty at all adjoined, the parties are, notwithstanding, bound, by the decree-arbitral; and therefore it would seem, that the adding a penalty is intended for enforcing performance; and, consequently, it were absurd to suppose, that it should have the contrary effect of freeing any of them on paying the penalty to the other; and favour of sopiting pleas would infer this interpretation, if the case were doubtful, as I humbly think it is not.

Bankton later affirms that adjunction of a penalty does not enable the debtor to free himself from the obligation by offering the penalty. If the words "By and Attour Performance" or similar expressions are absent from the obligation to perform a fact,<sup>133</sup>

the presumption also lies, that 'tis intended to strengthen the principal obligation, and not to come in place of it, as damage and interest; but, if it concern the fact of another, the debtor, doing what he can to procure performance, is free, upon payment of the penalty; and, if it appear to be a liquidation of the principal obligation, the penalty only is due.

In general, therefore, Bankton can be read as supporting the creditor's option of specific implement or damages. Those passages dealing solely with damages would not

then exclude the option, but would confirm the competence of one element of the choice presented to the pursuer, together with the rules for assessment on the seller's failure to deliver grain in due time.

### Kames

The clearest discussion of specific implement in the writings of Kames which I have found occurs in tract XI, "Personal Execution for payment of debt":<sup>134</sup>

It is a celebrated question in the Roman law, touching obligations, *ad facta praestanda*, Whether the debtor be bound specifically to perform, or whether he be liable *pro interesse* only. It is at least the more plausible opinion, that a man is bound according to his engagement; and after all, why indulge to the debtor an option to pay a sum, instead of performing that work to which he bound himself without an option? The person accordingly who becomes bound *ad factum praestandum*, is not with us indulged in an alternative. A refusal, when he is able to perform, is understood an act of contumacy and disobedience to the law. This is a solid foundation for the letters of four forms, which formerly were issued upon obligations *ad facta praestanda*. And the tenor of these letters is abundantly moderate; for it is worthy to be remarked, that there is not in them a single injunction but what is in the obligor's power to perform.

In the *Principles of Equity* Kames treats specific performance more diffusely than in *Historical Law-Tracts*. He does not clearly state the Scots law, and approaches the topic from the separate perspectives of the court of law and the court of equity-- a distinction which, though accurate in the English legal system, disturbs Scots mindful of Stair's declaration that in Scotland, by contrast with England, the jurisdiction of the supreme court is undivided.<sup>135</sup> Earlier in *Principles of Equity* Kames had acknowledged this undivided jurisdiction;<sup>136</sup> though he later asserted that the Court of Session had initially been considered a court of law only.<sup>137</sup> The sole relevance of this latter statement to the law of specific implement might, I imagine, be that, whereas the Acts of the Lords of Council, the body from which the Court of Session grew, record acts and decrees of specific implement as an ordinary remedy, the discretion to refuse it and grant damages instead, on grounds other than impossibility of performance, may have been a later equitable refinement of the Court of Session's jurisdiction. With these preliminary remarks, we turn to the relevant passage in *Principles of Equity*:<sup>138</sup>

In order to distinguish equity from common law on this subject, we begin by examining what power a court of common law has to compel persons to fulfil their engagements. That this court has not power to decree

specific performance, is an established maxim in England, founded upon the following reason, That in every engagement there is a term for performance; before which term there can be no demand; and after the term is past, the performance at the term is impletable....

Here a footnote sends us to Vinnius, *Comm.* 3.15.2. "A Court of common law," Kames goes on, speaking apparently of English courts, "confined to the words of a writing, hath not power to substitute equivalents; and therefore all [it can do] is to award damages against the party who has failed." In one sense he contradicts himself: damages come in lieu of performance. As he observes, they are not the performance itself: "This, it must be acknowledged, is a great defect; for the obvious intention of the parties in making a covenant, is not to have damages, but performance."<sup>139</sup> His favourable attitude towards specific implement may, perhaps, be discerned in his suggestion that the "defect ought to be supplied; and is supplied by a court of equity upon a principle often mentioned, That where there is a right it ought to be made effectual." This court sets another date for performance. But the chancery court's competence in this regard is limited by the main rule of English law on the adequacy of damages: Kames illustrates his doctrine by the sale of land, a contract typically one in which damages are considered inadequate; but he ignores the different example of a sale of ordinary goods freely available in the market. Even as an exercise in comparative law, then, the passage is deficient.

Further doubts arise from the treatment of conventional penalties.<sup>140</sup> "A penal sum is inserted in a bond or obligation as a spur on the debtor to perform." This is unexceptionable. "With respect to an obligation *ad factum praestandum*, no law can compel the debtor to perform, otherwise than indirectly by stipulating a penal sum in case of failure." I submit, though, that if the defender knows of an forthcoming action for specific implement, one consequence of which may be a decree supported by the compulsitor of imprisonment, his mind may be concentrated on the need to perform. Kames seeks to explain his averment by quoting Justinian's *Inst.* 3.15.7. and italicizes the closing words, "*si[ve] ita factum non erit, tunc poenae nomine decem aureos dare spondes.*" He then avers: "This sum comes in place of the fact promised to be done; and when paid relieves from performing the fact." But Bankton had said<sup>141</sup> that the defender able to perform could not free himself by paying the conventional penalty; several decisions referred to by Erskine and Bell bore this out;<sup>142</sup> Erskine later confirmed that including a penalty did not weaken the contract:<sup>143</sup> all conflict with the possible interpretation of Kames's loose generalization about payment of the penalty replacing performance of the fact-- an interpretation which would also undermine his



treatment of obligations *ad facta praestanda* in *Historical Law-Tracts*. Because of these conflicts, on the subject of specific implement the *Historical Law-Tracts* is preferable to *Principles of Equity*. Payment of the penalty in the contract replaces performance only if the performance becomes impossible or the creditor chooses damages.

### Erskine

In Erskine's *Institute* we do not find the clear statement in favour of specific implement that we do in Stair's *Institutions*; yet the competence of the remedy is made plain in passages about diligence and the various kinds of contract.

The procedure and effect of letters of horning against the debtor are expounded in *Inst.* 2.5.55. and following. Note that paragraph 59 starts with a sentence which states that the messenger is "required to charge the debtor to pay the debt, or perform the obligation....": here there may be a debtor for an obligation, though we now think of debts as "mere rights to demand payment of money at a stipulated time."<sup>144</sup> *Inst.* 2.5.59. explains that the diligences on failure to pay and failure to perform obligations *ad factum praestandum* both resulted in the debtor's being denounced rebel for non-performance. *Inst.* 2.12.50. and following discuss the procedure for adjudication in implement.

Our survey of the various contracts begins with *Inst.* 3.1.17: "by the law of Scotland, one who obliges himself to give in loan, or in pawn, may be compelled by an action to perform; though indeed, before the subject be lent or impignorated, it does not form the special contract of *mutuum* or *pignus*." The lender has the *actio directa commodati* to compel the borrower's performance of his obligations in *commodatum*;<sup>145</sup> but failure to restore the thing seems, from Erskine's citing Roman law, to result in an obligation (for the Scots defender as well, we infer) to pay the value of the thing.<sup>146</sup> The depositary's obligation to return the deposit to the depositor "is enforced by the *actio directa*."<sup>147</sup> And the seller is, "by the nature of the contract, obliged ... to deliver to the buyer the thing sold ..., to which he may be compelled by the *actio empti*...."<sup>148</sup>

The word "compelled" in these extracts may be thought equivocal, because the borrower in *commodatum* appears in contract law to be liable only for damages if he does not perform: so we turn to Erskine's discussion of *arrhae* and of conventional penalties for clues to his opinion on the competence of specific implement. The common problem thrown up by both passages is the effect of the defaulting party's attempt at freeing himself from the contract by paying money to the victim of his breach. Erskine considers *arrhae* the "corroborative symbol or mark that the bargain is

perfected";<sup>149</sup> unless the parties intend to complete the contract by having it written down, the general rule is that the giver of *arrahae* who resiles "not only forfeits it, but may be sued by the other party for performance; since what was intended for strengthening the contract cannot be wrested to the weakening of it." *Inst.* 3.3.86. begins:

In all obligations concerning things lawful, and in themselves possible, the obligant who fails in the performance of his part, must make up to the creditor the damage he has sustained through the non-performance, agreeably to the rule, *Loco facti non praestabilis, vel non praestiti, succedit damnum et interesse*.

This passage may appear unfavourable to specific implement: but the discussion of conventional penalties implies that the party who has rendered or offered performance to a defaulter able to render counter-performance may prefer specific implement to damages in lieu thereof:

Fixed penalties were, by the Romans, sometimes adjoined to obligations for the performance of facts; which seemed to be designed chiefly to remove the inconvenience arising in most cases from the uncertainty of the creditor's damage, by substituting a precise penal sum, which was understood to come in place of it; [*Inst. Just.* 3.15.7.] By our customs also, such penalties are not unfrequent: But they have no tendency to weaken the obligation itself, being adjoined purely for quickening the performance of the debtor; who therefore cannot get free by offering payment of the penalty, though the words of the style, *by and attour performance*, should be omitted.... It must, however, be admitted ... that a debtor who is bound for a fact to be performed by another, cannot, in the nature of things, be bound to precise performance; and so is liable no farther than for the conventional penalty.... No party in a mutual contract, where the obligations on the parties are the causes of one another, can demand performance from the other, if he himself either cannot or will not perform the counter-part; for the mutual obligations are considered as conditional.

If the debtor cannot get free by offering precise, liquidate damages, then *a fortiori* neither should the debtor who offers imprecise, illiquid damages to a creditor desiring specific implement.

Erskine does make exceptions to the creditor's general right to claim specific implement. Besides those of impossibility of performance (in which could be included the obligation for performance by a third party) and, perhaps, the borrower's freedom of choice in *commodatum*, there are two more: cautioners for the principal debtor's performance of a fact, who (consistently with the rule on performance by a third party)

are liable only for damages;<sup>150</sup> and members of a partnership, each of whom can dissolve it on reasonable grounds.<sup>151</sup>

### Baron David Hume

Baron David Hume's *Lectures*<sup>152</sup> as a professor at Edinburgh University show that the themes established in the institutional writings were stressed to his students in the Scots law class during the early nineteenth century. He directly treated the creditor's right to specific implement in his lecture on husband and wife, distinguishing the engagement as an exception to the general rule:<sup>153</sup>

In the ordinary case, the person who engages for anything to be done or performed at a future time, to grant a lease for instance, or to sell and convey anything at such a term, is well and firmly bound to that effect. He may be compelled to perform, if this be still in his power, and he cannot avoid performance by offer of damages, and if disabled from performing, he must make satisfaction for his failure. Now a promise of marriage *de futuro* has no such power in our practice.

Hume returned to the unusual nature of this exception: "The well-known rule of law is, *Loco facti imprestabilis subit damnum et interesse*. But here is an instance of a decree of damages *loco facti prestabilis*,-- in place of a fact which the party could still perform, and will not, and which the law says that he shall not perform, and shall be excused from performing, which it invites and encourages him not to perform, if he dislike it."<sup>154</sup>

Examples of the general competence of specific implement appear in the lectures on special contracts. For the seller,<sup>155</sup>

the main obligation ... is to make delivery of the stipulated subject-- to the buyer himself if solvent, and if not, to his creditors, provided they find it for their interest to take the goods, and are willing to pay the full price for them, finding that the goods are an advantageous bargain, and now worth more to the estate than the covenanted price. The seller is solvent-- can make delivery-- and has no defence against it-- if the full price is offered by those who have now the substantial interest in the buyer's estate.

Equally, the buyer should receive the goods and pay the price.<sup>156</sup> He need not receive them if the dilatory seller has not delivered goods expressly or implicitly required for a particular date or season.<sup>157</sup> "Otherwise in a great many and in ordinary cases ... the buyer may still, notwithstanding some delay be obliged to receive, and the seller be

obliged to deliver, account being always had of the damage by the delay, if any can be shewn."<sup>157</sup>

In location or tack, the landlord must first put the tenant into possession of the tenement; "wherein if he fail, he shall be liable in the damage, and shall be decerned still to implement, if this be in his power."<sup>158</sup> This lecture also shows Hume's attitude to conventional penalties;<sup>159</sup> this time the obligations, being negative, are specifically enforceable by interdict. He explains that a tenant cannot go ahead and do what the lease forbids him to do, and hope to escape by offering the agreed penal rent.

Now damages only come in room of a performance which cannot be obtained-- *loco facti imprestabilis*. No one is obliged to accept damages, how high soever, so long as the thing itself which has been undertaken can be specifically performed. If therefore the landlord have timeful warning of the tenant's intention to mislabour he is not obliged to acquiesce, but is entitled, as I understand, to have an interdict from the Sheriff or Judge Ordinary to hinder him from proceeding in his purpose. He is not obliged to take the penal rent as damages for failure of implement of the tack; he may insist for specific implement, since this is possible and easily done.

Hume then summarizes illustrative precedents.

#### Bell

One of those students, G.J. Bell, followed Hume as professor.<sup>160</sup> Bell's views on specific implement conform to the grand theme established so far: his treatment of the remedy in the law of sale is shown later in a discussion of *Sutherland v. Montrose Shipbuilding Co.*;<sup>161</sup> and his exposition of lease is in similar terms,<sup>162</sup> for where

the subject has not been delivered, the lessee will be bound to take possession, and pay the hire, if the lessor or his creditors choose to insist on the contract; and he is, at all events, entitled to demand possession, or damages for the want of it.

The impossibility, however, of delivering the subject (in consequence of its accidental destruction, for example) is a good answer to the lessee's action....

After observing that a penalty may be aimed at encouraging performance and simplifying the assessment of damages, he states its effect on the parties' rights in lease:<sup>163</sup>

Where the penalty is plainly intended to secure against some possible invasion, although it may be conceived in the shape of an increased rent, the party against whom it is pointed is not entitled to insist on taking the enlarged use, paying the penal sum. It is held necessary, in order to his exercising such power, that a *jus quaesitum* be plainly stipulated; as, for example, that a tenant shall have it in his power to follow a particular course on paying a certain rent. Unless there be such stipulation, the penalty, though in one sense, and in the case of necessary or actual deviation, a conventional damage, is to be held as truly an instrument of restraint, and the payment of the penalty does not liberate from the performance of the engagement.

The footnote in McLaren's edition gives Erskine, *Inst.* 2.3.86.; *Ayton v. Paterson*,<sup>164</sup> *Crichton v. Perie*,<sup>165</sup> *Beattie v. Lambie*,<sup>166</sup> *Curtis v. Sandison*,<sup>167</sup> and *University of Glasgow v. Faculty of Surgeons*.<sup>168</sup>

#### Notes

1. THE REGISTER OF BRIEVES 12 (Lord Cooper (ed.), 1946 (Stair Society 10)).
2. *Id.*, Ayr MS. i (p. 35), xi-xvii (pp. 37-9); Bute MS. 5-16 (pp. 53-4, 57).
3. H. McKECHNIE, JUDICIAL PROCESS UPON BRIEVES, 1219-1532 18 (1956).
4. REGISTER OF BRIEVES (Str. Soc. 10) Ayr MS. xv. (pp. 38-9); Bute MS. 8 (p. 53). *See*, also, Bute MS. 27 for persuading a pursuer to abandon an action in an ecclesiastical court.
5. *Id.*, Ayr MS. xvii (p. 39); Bute MS. 14 (p. 53).
6. *Id.*, Ayr MS. xiii (p. 38); Bute MS. 7 (p. 53).
7. *Id.*, Bute MS. 15 (p. 54).
8. McKECHNIE, JUDICIAL PROCESS 15.
9. QUONIAM ATTACHIAMENTA (Str. Soc. 11) 342.
10. *Id.*, 345.
11. REGIAM MAJESTATEM 3.4.5. (Str. Soc. 11 pp. 195-6); R.M. 3.14.6. (pp. 206-7).
12. *Id.*, 345.
13. 1 ACTS OF THE PARLIAMENTS OF SCOTLAND 470.
14. 2 F. POLLOCK & F.W. MAITLAND, THE HISTORY OF ENGLISH LAW 523. *See*, also, 595-6.
15. *Id.*, 524.
16. *Id.*, 217, 218 and n. 2.
17. GLANVILL, TREATISE ON THE LAWS AND CUSTOMS OF ENGLAND VIII ch. 1.
18. *Id.*, VIII ch. 5.
19. REGIAM MAJ. 1.27 (Str. Soc. 11, pp. 94-6).

20. REGIAM MAJ. 95-6; LORD COOPER, SELECT SCOTTISH CASES OF THE THIRTEENTH CENTURY liv-lv (1944).
21. COOPER, SELECT SCOTTISH CASES liii.
22. H. HOME (LORD KAMES), HISTORICAL LAW-TRACTS 65 (4th ed., 1792).
23. 1 W. ROSS, LECTURES 98 (2d ed., 1822).
24. COOPER, SELECT SCOTTISH CASES liv.
25. 2 POLLOCK & MAITLAND, HISTORY 106 and n. 3; 104; 217-8.
26. *Id.*, 218 and n. 4.
27. BRACTON'S NOTE BOOK pl. 1165 (1235).
28. *Id.*, pl. 390 (1230).
29. Groenewald, A Comparative Study of Specific Performance in English and South African Law 24-5 (unpublished Ph.D. thesis, London University 1962); S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 249 (2d ed., 1981).
30. MILSOM, HISTORICAL FOUNDATIONS 248.
31. *Id.*, 249-50.
32. *Id.*, 252.
33. REGIAM MAJ. 30; LORD COOPER, THE DARK AGE OF SCOTTISH LEGAL HISTORY 1350-1650 18-9 (1952).
34. D.M. Walker, Equity in Scots Law 184-5 (Ph.D. thesis, Edinburgh University 1952). *See*, also, 305-6.
35. Mondwell v. McCulloch (1489) A.D.C. I, 137.
36. Somerville v. Douglas (1492) A.D.C. I, 247.
37. Ahannay v. Ahannay (1493) A.D.C. I, 318; Dunbar v. Dunbar (1501) A.D.C. III, 115; Archbishop of St Andrews v. Ker (1501) A.D.C. III, 57.
38. Bruce v. Monteith (1496) A.D.C. II, 8.
39. Merchants of Aberdeen v. Young (1497) A.D.C. II, 88.
40. Crichton v. Kinnaird (1499) A.D.C. II, 385.
41. Lord Seton v. Oliphant (1492) A.D.C. I, 284.
42. Lord and Lady Rothes v. Harvey (1494) A.D.C. I, 347.
43. Auchinleck v. Auchinleck (1495) A.D.C. I, 428.
44. Ker v. Lord Hume (1501) A.D.C. III, 58.
45. Broune v. Borthuic (1501) A.D.C. III, 75.
46. Charteris v. Kirkpatrick (1501) A.D.C. III, 12; Hepburne v. Lord Levingstone (1501) A.D.C. III, p. 73 (decree of specific implement, with alternative of payment of stipulated penalty).
47. Arkill v. Rede (1501-2) A.D.C. III, 151.
48. Smith v. Robesone and Olephant (1501) A.D.C. III, 90; Abircrumby v. Cunynghames (1501-2) A.D.C. III, 169.
49. Lord Sinclair v. Bell (1533) SELECTED CASES FROM ACTA DOMINORUM CONCILII ET SESSIONIS 146 (I.H. Shearer (ed.), 1951 (Str. Soc. 14)).
50. Richeman and Abirerd v. Broun and Clerk (1532) SELECTED CASES 169-70 (Str. Soc. 14).

51. Countess of Crawford v. Achilmere of that Ilk (1482) A.D.C. II, cvii.
52. COOPER, SELECT SCOTTISH CASES liii; Fry, 5 L.Q.R. 235 (1889); De Rossi, 48 J.R. 129 (1936); 1 ROSS, LECTURES 251; S. OLLIVANT, THE COURT OF THE OFFICIAL 65-6, 86 (Str. Soc. 34 (1982)).
- 53.. R.M. HELMHOLZ, CANON LAW AND THE LAW OF ENGLAND 263 (1987).
54. *Id.*, 263 n. 2.
55. *Id.*, 263 n. 1.
56. *Crito* 49E in PLATO, THE LAST DAYS OF SOCRATES 89 (tr. by H. Tredennick, 1969).
57. Dilcher, 78 Z.S.S. (Rom. Abt.) 277, 302-5.
58. 1 CORPUS IURIS CANONICI 886.
59. E.W. KEMP, AN INTRODUCTION TO CANON LAW IN THE CHURCH OF ENGLAND 23 (1957); F. SPIES, DE L'OBSERVATION DES SIMPLES CONVENTIONS EN DROIT CANONIQUE (1928); HELMHOLZ, CANON LAW 263 and n. 3; R. FEENSTRA & M. AHSMANN, CONTRACT 12-3 (1980).
60. WILLIAM HAY'S LECTURES ON MARRIAGE 7, 9; 269, 271 (Str. Soc. 24 (1967)). *See*, also, xxxv.
61. LIBER OFFICIALIS SANCTI ANDREE 8-9, 14 (Abbotsford Club, 1845). *See*, also, xv.
62. Coing, 71 L.Q.R. 223, 236-7 (1955); KEMP, INTRODUCTION 22; 1 ROSS, LECT. 248-9.
63. OLLIVANT, COURT OF THE OFFICIAL 150-2.
64. M. LUTHER, *An Open Letter to the Christian Nobility of the German Nation*, WORKS Vol. 2, p. 126; A.J. KERR, LAW AND JUSTICE 42 (1963).
65. HELMHOLZ, CANON LAW 103, 117.
66. *Id.*, 105-6.
67. 1 JOHN KNOX'S HISTORY OF THE REFORMATION IN SCOTLAND 15-6 (W.C. Dickinson, ed. 1949).
68. *Id.*, 125, 127-9.
69. *Id.*, Vol. II, 306.
70. HELMHOLZ, CANON LAW 107.
71. LUTHER, *A Treatise concerning the Ban*, para. 20, WORKS, Vol. 2, p. 53.
72. J. CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 4.11.7. (Vol. 2., p. 219).
- 73.. HELMHOLZ, CANON LAW 107-8.
74. *Id.*, 108.
75. *Id.*, 115-6.
76. *Id.*, 117.
77. COOPER, SELECT SCOTTISH CASES xxxii.
78. OLLIVANT, COURT OF THE OFFICIAL 86-8, 152.
79. REGISTER OF BRIEVES 54-5 (Str. Soc. 11).

80. (1233) SELECT SCOTTISH CASES 33; REGISTER OF BRIEVES 18 (Str. Soc. 10); OLLIVANT, COURT OF THE OFFICIAL 135; 1 ROSS, LECTURES 101; 1 BELL, COMMENTARIES 433.
81. 1 ROSS, LECT. 251-2, giving BALFOUR, PRACTICKS 682.
82. G. STEWART, A TREATISE ON THE LAW OF DILIGENCE 705 (1898).
83. 1 ROSS, LECT. 260.
84. 1 BELL, COMM. 432.
85. STEWART, DILIGENCE 706.
86. THE PRACTICKS OF SIR JAMES BALFOUR OF PITTENDREICH Volume 1 (Str. Soc. 21), Vol. 2 (Str. Soc. 22) (pagination consecutive): 29-30.
87. *Id.*, 178 and *see* xlv.
88. *Id.*, 157.
89. *Id.*, 390.
90. 1 ROSS, LECT. 319.
91. BALFOUR, PRACTICKS 209.
92. *Id.*, 413.
93. *Id.* 203.
94. *Id.*, 205.
95. *Id.*, 157.
96. HOPE'S MAJOR PRACTICKS 1608-1633 Vol. I (Str. Soc. 3), Vol. II (Str. Soc. 4): vol. I p. 94.
97. *Id.*, p. 99.
98. HOPE'S MAJOR PRACTICKS 2.6.1.
99. *Id.*, 2.3.1.
100. *Id.*, 2.1.16.
101. *Id.*, 7.19.13. (Vol. II).
102. *Id.*, 7.19.2.
103. T. CRAIG, THE JUS FEUDALE 2.2.22. (tr. J.A. Clyde, 1934 p. 385); J.F. 1.15.30. (pp. 297-8).
104. "Quod si debitum in facto tantum consistat, vel etiam in dando...": T. CRAIG, JUS FEUDALE TRIBUS LIBRIS COMPREHENSUM p. 327 (1655).
105. J.F. 3.2.4. (p. 93 *et seq.* of Clyde's tr.).
106. *Id.*, 3.2.5.
107. *Id.*, p. 925; contrasting the former delays and the law's current attitude to creditors' rights: "... dilationes emergebant quibus creditor protrahebatur in rei suae solutione, quae in jure favorabilis est": p. 327 of the 1655 edition.
108. J.F. 2.7.1. (pp. 465-6 of Clyde's tr.).
109. *Id.*, p. 544.
110. *Id.*, 477.
111. *Id.*, p. 576.
112. J.F. 2.12.25-6 (pp. 630-1); J.F. 2.17.22. (p. 736); J.F. 2.19.2. (p. 782).
113. J.F. 2.11.34. (p. 608).



114. J.F. 2.10.10. (p. 579).
115. J.F. 2.2.29., 30. (pp. 391-2).
116. Scholtens, 70 S.A.L.J. 22, 26 (1953).
117. STAIR, INSTITUTIONS 1.1.22.
118. STAIR, INST. 1.3.1.
119. *Id.*, 1.2.3.
120. *Id.*, 1.2.7.
121. *Id.*, 1.4.6.
122. *Id.*, 1.10.5.
123. *Id.*, 1.10.6.
124. *Id.*, 1.14.3.
125. G. MACKENZIE, INSTITUTIONS 3.3.1. (8th ed., 1758).
126. *Id.*, 3.3.28.
127. *Id.*, 3.3.29.
128. A. McDouall, LORD BANKTON, INSTITUTE 1.11.12.
129. *Id.*, 1.11.13.
130. Ager v. Hitchcock 1950 (3) S.A. 372 (D) 375 *per* Caney A.J.
131. *See*, also, BANKTON, INST. 1.11.69.
132. *Id.*, 1.23.12.
133. *Id.*, 1.23.76.
134. H. HOME (LORD KAMES), HISTORICAL LAW-TRACTS 357-8 (4th ed., 1792).
135. STAIR, INST. 4.3.1.
136. H. HOME (LORD KAMES), PRINCIPLES OF EQUITY 21 (new edition, 1825).
137. *Id.*, 419.
138. *Id.*, 208.
139. *Id.*, 209.
140. *Id.*, 378.
141. BANKTON, INST. 1.23.12.; 1.23.76.
142. ERSKINE, INSTITUTE 3.3.86.; 1 BELL, COMM. 669.
143. ERSKINE, INST. 3.3.86.
144. 2 BELL, COMM. 15; W.A. WILSON, THE LAW OF SCOTLAND RELATING TO DEBT 1 (1982).
145. ERSKINE, INST. 3.1.24.
146. I submit that as ownership does not pass from lender to borrower in *commodatum*, the lender could bring the real action of *rei vindicatio* for the restoration of the thing, and need not content himself with contractual damages in lieu of possible restoration.
147. ERSKINE, INST. 3.1.27.
148. *Id.*, 3.3.9.

149. *Id.*, 3.3.5.
150. *Id.*, 3.3.62.
151. *Id.*, 3.3.26.
152. BARON DAVID HUME'S LECTURES 1786-1822 Vol. I (Str. Soc. 5), Vol. II (Str. Soc. 13), Vol. VI (Str. Soc. 19).
153. 1 HUME, LECT. 27. The editor, C.C.H. Paton reminds us in notes that *Stewart v. Kennedy*, 1889, 17 R. (H.L.) 1 supports the general competence of the remedy; that impossibility is not the sole exception; and that partnership and service contracts are also exceptions.
154. 1 HUME, LECT. 30.
155. 2 HUME, LECT. 31.
156. *Id.*, 50-1.
157. *Id.*, 51.
158. *Id.*, 71.
159. *Id.*, 88-9.
160. 6 HUME, LECT. 411.
161. *Sutherland*, 1860, 22 D. 665 (2d Div.): *infra* chapter 10.
162. 1 BELL, COMM. 482.
163. *Id.*, 669.
164. 1627, M. 10034.
165. 1630, M. 10035.
166. 1695, M. 10039.
167. 1831, 10 S. 72 (1st Div.).
168. 1840, 1 Rob. 397.

## Chapter 2: A Sketch of Specific Performance in Roman and Roman-Dutch Law

What was the background to the distinction of Bartolus that was mentioned by Craig?<sup>1</sup> Was Stair correct when he said that, in the common opinion of the doctors, obligations *dandi* but not obligations *faciendi* were specifically enforceable?<sup>2</sup> My summary has been guided mainly by the theses of Fischer,<sup>3</sup> McCall,<sup>4</sup> and Groenewald,<sup>5</sup> and an article by Dilcher.<sup>6</sup>

The roots of the controversy over the civilian version of specific performance of contracts lie in Roman law. Conflicting texts provided material for a long debate and the decoration of current law with a respectable patina of Roman authority, however uncertain.

### Roman Law

#### (1) The period of the *legis actiones*

The undeveloped laws of this time allowed the plaintiff to pursue regulated self-help. What the *iudex* decided, the judgment creditor enforced.<sup>7</sup>

The clause "sicut olim fieri solebat" in the disputed text<sup>8</sup> of Gaius's *Inst.* 4.48., written in the subsequent period of the formulary procedure, suggests that specific performance had previously been competent. Fischer, for one, thought the text inaccurate.<sup>9</sup> De Zulueta<sup>10</sup> and McCall<sup>11</sup> would delete the clause as corrupt. Wenger in his German *Institutionen*,<sup>12</sup> though he changed his mind in the English translation, *Institutes*,<sup>13</sup> thought the proper place for the clause to be either after "condemnat" or "sed." Poste, acknowledging that the literal translation justified specific relief, argued that "it would be strange if the Roman jurisprudence thus retrograded, and its second stage had been less perfect than its first";<sup>14</sup> a criticism not quite answered by Groenewald's remark that, under the formulary procedure, courts assumed responsibility for executing their orders, so that this innovation, though resulting in money damages only, was not retrograde.<sup>15</sup> Von Lübtow described the controversial clause as one of the historical comparisons which Gaius liked to make; but concluded that the periods of the *legis actiones* and of the formula both allowed damages, not specific relief.<sup>16</sup>

Contenders for the existence of specific relief during this first period include Sandars,<sup>17</sup> Jolowicz,<sup>18</sup> and, apparently, Groenewald<sup>19</sup> and Kaser.<sup>20</sup>

As regards the means of enforcement, Muirhead<sup>21</sup> thought that the plaintiff had to invoke the *arbitrium litis aestimandae* (part of the *legis actio sacramenti*) against the

obdurate defendant, thus converting the performance obligation into a damages obligation for the fulfilment of which the defendant had to give two sureties. Groenewald<sup>22</sup> objected that even if this procedure existed so early, the plaintiff might also have used self-help under the praetor's supervision,<sup>23</sup> or else the *legis actio per manus iniunctionem*.<sup>24</sup> The latter procedure, however, required the performance to be valued in damages which the defendant could pay in order to prevent the seizure of his person.<sup>25</sup>

## (2) The formulary period

Gaius's *Inst.* 4.48. declared that the *condemnatio* was fixed in money (*condemnatio pecuniaria*).<sup>26</sup>

As regards enforcement, proceedings *per manus iniunctionem* remained lawful.<sup>27</sup> Indirect pressure was also exerted on the defendant if into the formula the praetor inserted a *clausula arbitraria*, which vested the *iudex* with authority to exhort the defendant to actual performance, and with a discretion in fixing damages for recalcitrance. The amount might tend to reflect the plaintiff's perhaps exaggerated valuation of the subject-matter.<sup>28</sup> The clause ran: "nisi arbitrato suo restitatur, condemna."<sup>29</sup> The snag is the meaning of "restituere" in classical law. Preferring what Groenewald<sup>30</sup> called the "narrow construction," McCall argued that in classical and Justinianian law the basis of "restituere" was proprietary, not contractual-- justifying specific restitution, not specific performance-- as the nature of *actiones arbitrarie* showed.<sup>31</sup>

## (3) The classical and post-classical periods

In the classical *cognitio extraordinaria*, Kaser tells us, judgments did not have to sound in money<sup>32</sup> and personal execution might be either the formulary seizure of the debtor<sup>33</sup> or, on the basis of *D.* 42.1.15.pr., might be ordered by the judicial officer himself.<sup>34</sup>

Controversy persists over the legality of specific performance in this later period of Roman law.<sup>35</sup>

### (i) Opinions favouring the remedy

*D.* 6.1.68., on a broad reading of "restituere" to include contractual claims,<sup>36</sup> seems to suggest it:<sup>37</sup>

Qui restituere iussus iudici non paret contendens non posse restituere, si quidem habeat rem, manu militari officio iudicis ab eo possessio transfertur et fructuum dumtaxat omnisque causae nomine condemnatio fit. si vero non potest restituere, si quidem dolo fecit quo minus possit, is, quantum adversarius in litem sine ulla taxatione in infinitum iuraverit, damnandus est. si vero nec potest restituere nec dolo fecit quo minus possit, non pluris quam quanti res esset, id est quanti adversarii interfuit, condemnandus est. haec sententia generalis est et ad omnia sive interdicta, sive actiones in rem sive in personam sunt, ex quibus arbitrato iudicis quid restituitur, locum habet.

Interpolations, perhaps Tribonian's,<sup>38</sup> weaken the authority of this passage;<sup>39</sup> one of them is the last sentence. The crucial word is "restituere." Fischer,<sup>40</sup> Philips,<sup>41</sup> and McCall<sup>42</sup> aver that, as *D. 6.1.* concerns the *rei vindicatio*, personal actions are irrelevant. If "restituere" did cover personal actions, says Groenewald,<sup>43</sup> it would justify specific performance of sale; but this possibility, though supported by *I. 4.6.17.*<sup>44</sup> in so far as the *actio in personam* on sale lies for a thing, is negated by *D. 6.1.50.pr.*

Groenewald<sup>45</sup> liked the approach of Radin<sup>46</sup> and Meijers,<sup>47</sup> who kept more closely to the texts. One group thereof supports damages as the sole remedy for contractual breach: *D. 42.1.13.1*; *D. 19.1.1.pr.*; *C. 4.49.4.*; *D. 45.1.113.1.*; *C. 4.21.17.* A second group allows the plaintiff alternative relief: *D. 19.1.6.1.,2.*; *D. 19.1.21.4.*;<sup>48</sup> *D. 19.1.11.18.*; *D. 18.1.75.* Groenewald then discussed various opinions.

Buckland and McNair<sup>49</sup> suggested that the compilers of the *Corpus Iuris Civilis* adopted classical jurists' writing even if the law had since changed; and this happened as regards the first group of texts here. Groenewald thinks that this suggestion assumes too much, rendering inaccurate *D. 19.1.1.pr.*, probably drafted with care.<sup>50</sup>

Criticizing Fischer's peculiar translation of "cogi," Meijers remarked that in *D. 2.13.*, "Praetor cogit, yet the action there given also resulted in nothing other than quod interfuit."<sup>51</sup> Groenewald expands this remark as the most satisfactory resolution of the conflict about specific performance.<sup>52</sup> The judge in *cognitio extraordinaria* could issue a *pronuntiatio* exhorting the defendant to actual performance: *C. 7.45.14.* could be applied *iudicio bonae fidei* to sale, under *D. 19.1.1.pr.,1.*, and 2. The first group of texts should be read as laying down the circumstances in which a *pronuntiatio* would have been competent. Yet judgment still sounded in damages. *Pronuntiatio* would not have been directly executable, for otherwise it would have become a fixed judgment instead of an exhortation;<sup>53</sup> but it remained an indirect means of pressurizing the defendant to perform, because, as under the formulary *arbitrium*,<sup>54</sup> the court exercised a discretion in assessing damages. Groenewald speculates that direct enforcement was limited by the courts' initial reluctance to abandon former practice. He concedes that *C. 4.21.17.*

apparently allows the seller to choose between performance and damages; and concludes that, without further evidence, the question of specific performance in Roman law remains open.<sup>55</sup>

(ii) Opinions rejecting the existence of the remedy

Facile citation of the maxim *nemo potest praecise cogi ad factum*,<sup>56</sup> which Groenewald<sup>57</sup> did not find anywhere in the *Corpus Iuris Civilis*, was uninformative.

Fischer<sup>58</sup> supported his objections by the first group of texts. He also discussed *Pauli Sententiae receptae ad filium* 1.13A.4. (written after 206 A.D.): "Si quid, quod emptum est, neque tradatur, neque mancipetur, venditor cogi potest ut tradat vel mancipet." Fischer cited Noodt<sup>59</sup> as authority for translating "cogi" as "in duty bound" and "legally obliged," not "compelled by legal execution." He drew attention to Paul's *Quaestiones* fragmentarily recorded in *D.* 19.1.64., and to *D.* 18.1.25.1., *D.* 2.13.4.5., *D.* 2.13.6.1., *D.* 2.13.8.1., *D.* 2.4.17., *D.* 45.1.81.pr., and Cicero's *Oratio in Verrem* 2.12.2. As already noted,<sup>51</sup> Meijers objected that this incorrect meaning of "cogi" did not appear in any Latin dictionary, and suggested that damages could be seen as indirect compulsion, as shown by the incidence of the verbs "cogi" and "compelli" in *D.* 2.13. Groenewald joined by quoting *C.* 4.39.6. as evidence of a meaning more positive than Fischer's translation.<sup>60</sup>

Various other opinions have been expressed on *P.S.* 1.13A.4. For the view that it might refer to the judge's authority to utter *arbitrium* for performance though damages remained the sole remedy, Groenewald<sup>61</sup> quoted *Ulpiani ex libris institutionum fragmenta Vindobonensia*, paragraphs 4 and 5.<sup>62</sup> On this interpretation, Paul's weight could be added to the list who think that "restituere" applied to personal actions. Buckland and McNair considered that *P.S.* 1.13A.4. indicated failure of delivery or *mancipatio* to be a ground of action, though the means of enforcement was not explicated;<sup>63</sup> Girard, that it referred to the seller's duty of conveyance by *traditio* or *mancipatio*;<sup>64</sup> Schultingh, that the text was corrupt.<sup>65</sup> Schulz said that the *Pauli Sententiae* was radically revised and clearly showed post-classical but not Byzantine or Visigothic origin.<sup>66</sup> McCall<sup>67</sup> saw *P.S.* 1.13A.4. as

the point of departure from the classical law position in which the purchaser could only recover damages for non-delivery, to the vulgar law where the purchaser ... had the owner's action, *rei vindicatio*, to obtain possession.... [The text] possibly signifies the recognition that the clause *nisi restituatur* could be enforced by *manus militaris*. Hence it is probably the most important text in explaining the discrepancy between the operative practice in

early medieval law of compelling delivery in sale, and the absence of such practice in the *Corpus iuris*. When JUSTINIAN revived the distinction between contract (or consensus) and the passing of ownership, the purchaser could no longer employ *manus militaris* to compel delivery, though JUSTINIAN retained the procedure to assist the true owner.

McCall develops this opinion in his chapter on the Vulgar law.<sup>68</sup> He follows the insights of Levy.<sup>69</sup> The *Corpus Iuris Civilis* was not solely classical and Justinian law; most emendations reflected operative law not made by Justinian.<sup>70</sup> Constantine had officially recognized this Vulgar law,<sup>71</sup> which prevailed till Justinian's time in the East and, in the West, during and beyond that, as the effective law with Germanic admixture after the sixth century.<sup>72</sup> He tried to stop this degeneration of the classical law and to remove post-classical Vulgar law; yet his codification included Hellenic influences and many *constitutiones* using concepts of Vulgar law; and after the sixth century his *Corpus Iuris Civilis* suffered four hundred years of neglect in the West.<sup>73</sup> McCall criticizes historians of German and other legal systems who ignore the continuity, for the earliest Germanic codes preceded Justinian's compilation.<sup>74</sup>

Vulgar Roman law blurred the classical distinction between *dominium* and *possessio*.<sup>75</sup> *Dominium* now included *iura in re aliena* and was used interchangeably with *possessio*, seen as its chief element.<sup>76</sup> Even if the *petitor* established his right against the *possessor*, entitlement was expressed in terms of *possessio*, whether *iure* or *corpore*.<sup>77</sup> Acts of obligation coalesced with acts of disposal;<sup>78</sup> sale, in particular, became conveyance.<sup>79</sup> Documents were relied on as supporting evidence.<sup>80</sup> Payment was essential to conveyance by sale.<sup>81</sup> If, unusually, the documents showed one person as buyer, and another person paid the price, ownership went with delivery.<sup>82</sup> Levy concluded that payment only lost its decisiveness to the combination of *traditio* and documentation.<sup>82</sup> "In the less significant case of the verbal sale of movables, designation was irrelevant and ownership went to the payer."<sup>83</sup> Save in the unusual exception, the buyer who had paid but not yet taken delivery was better placed than the buyer suing on a purely contractual obligation: and McCall views this as the "*crucial point in the extension of specific performance to compel delivery of the thing sold.*"<sup>84</sup> The distinction between the *actio in personam* and the *actio in rem* changed: now the personal lay for obtaining money, the real for obtaining the non-pecuniary thing itself.<sup>85</sup> The owner was regarded as claiming recovery if possible.<sup>86</sup> "JUSTINIAN ... retained the remedy as an alternative to the contractual condemnation in money and hence '*sive actiones in rem, sive actiones in personam*' in D. 6.1.68."<sup>86</sup>

### The Germanic Codes and other non-Roman sources

McCall in Chapter III goes on to discuss the influence of "the Vulgar Law on the Roman-Germanic kingdoms, and the development of the concept of specific performance up to the Romanisation in the twelfth century"<sup>87</sup> and to contest the views of Fischer<sup>88</sup> and Fockema Andreae<sup>89</sup> that the remedy originated in Germanic rather than in Roman law. Specific enforcement of contracts was known in the Germanic systems; but, as "the common opinion of the doctors" alluded to by Stair was formed in a debate revolving mainly around Roman and Romanist texts, for brevity's sake I omit Germanic law. Canon law on contract enforcement I have noted.<sup>99</sup> Italian and French law of the Middle Ages, and Langobardic feudal law, which also allowed specific performance, were sketched by Fischer.<sup>91</sup>

### The Writings of the Romanists

Fischer<sup>92</sup> and McCall<sup>93</sup> discuss at length, and Dilcher<sup>94</sup> the earlier part of, the Romanists' writing which spanned seven centuries. In the limited space of a comparative-law thesis it is convenient to record their main conclusions; to seek broad themes rather than the sometimes factitious distinctions by which each side countered the other; and so to marshall the jurists, as McCall<sup>95</sup> does, into three groups of opinion on specific performance of contracts: for, against; and a middle way. McCall says that the competence of the remedy was approached by two questions, one specific, the other general.<sup>96</sup> First, could the buyer claim delivery of the thing, or had he to content himself with damages?-- thus Accursius in gloss *agitur* on *D. 19.1.1.pr.*: "Quid autem si emptor praecise velit habere rem, an potest?"; and later the commentators: "Venditor an praecise teneatur rem venditorem emptori tradere, si rem habet, an vero liberatur praestatione eius, quod interest?"<sup>97</sup> Second, could the defendant be compelled to do what he had promised?-- as Accursius put it, in gloss *obligationibus* on *D. 42.1.13.1.*: "Sed an praecise ad factum compelli?" The two questions overlap when a third is raised: "Was the seller's obligation to deliver *facere* or *dare*?"<sup>98</sup>

The line of reasoning then usually takes on one of the following forms:

1. The obligation to deliver is *facere* and since all *obligationes faciendi* are resolved by the payment of damages, so is the obligation to deliver in sale.
2. The obligation to deliver in sale is *dare* or a mixture of *dare* and *facere* or neither one nor the other, and, although all *obligationes faciendi* are resolved in damages, the obligation to deliver in sale ... may be compelled, because all *obligationes dandi* are compellable or simply because of its peculiar nature.
3. All obligations whether they be *dare* or *facere* may be compelled, including the obligation to deliver in sale.



Impossibility of performance was a defence.<sup>99</sup>

Dilcher studied enforcement of *obligationes dandi* in more detail than did McCall. Splitting up the types of obligations goes back to Gaius's *Inst.* 4.2., where they are either *dare* (including *restituere*), *praestare* (including *tradere* (*D.* 19.1.11.2.)), or *facere*; a trisection adopted by Paul (*D.* 44.7.3.pr.).<sup>100</sup> In Roman law, says Dilcher,<sup>101</sup> judgments for specific relief (*Sachkondemnation*) rather than for money damages (*Geldkondemnation*) were competent for breach of *obligationes dandi*. The Gaian trisection entered the glossators' discussions, where *tradere* split away from *praestare*.<sup>102</sup> Specific relief remained competent for breach of *obligationes dandi* and for *restituere*, in the view of the glossators<sup>103</sup> and Blanosco, an early commentator.<sup>104</sup> Jacques de Révigny, leader of the ultramontani, introduced a distinction: in general, *obligationes dandi* were specifically enforceable;<sup>105</sup> but, as an exception, innominate real contracts resolved themselves, on breach, into damages only.<sup>106</sup> The exception was then made by Johannes Faber.<sup>106</sup> The later Italian commentators kept the general rule on *obligationes dandi* and also the exception.<sup>107</sup> At this stage, then, is one qualification of Stair's averment about *obligationes dandi*.

We proceed to the seller's obligation of delivery and the general issue of specific performance. Both the main questions referred to above were put, and opposing sides taken, by the glossators Bulgarus and Martinus.<sup>108</sup> Bulgarus was against the buyer's claim to specific performance; Martinus was for it. As regards specific performance of contracts generally, Bulgarus was against it; Martinus was for it.

The middle way was taken by jurists who agreed with Martinus about the sale question but not about the general one. Distinguishing between *dare* and *facere*, as Accursius,<sup>109</sup> Roffredus, the ultramontani, and Bartolus had done, they answered the general question in Bartolus's words, that obligations to do a mere act (*merum factum*) were not specifically enforceable.<sup>110</sup> Here they faced a circular argument, for *D.* 45.1.72.pr. and *D.* 45.1.75.7. classified *fundum tradere* and *vacuam possessionem tradere* as *obligationes faciendi*. So the jurists of the middle way, probably because current law already permitted specific enforcement of the seller's obligation to deliver, were driven to reclassify it, either as an *obligatio dandi* or as a mixture of *dandi* and *faciendi*. "The medieval dilemma," McCall<sup>111</sup> says, "was that the purchaser appeared to have a vindictory or restitutionary remedy [enforceable *manu militari* (*D.* 6.1.68.)] whilst, according to the clear provisions of the *Corpus Iuris*, he was not yet owner of the thing sold." This question, described by Christinaeus as *celebris inter doctores*, formed the backdrop to his reports of cases in which the Court of Brabant decided claims for

specific performance; and these reports were cited by the jurists expounding the current law of Holland.<sup>111</sup>

After the sale exception won over all save jurists who adhered to Justinian texts, specific performance was extended, under the influence of canon law, to *obligationes faciendi* generally.

Texts were pulled this way and that by the argufiers. The sale question turned on *D. 19.1.1.pr.*; *D. 19.1.12.*; *D. 42.1.13.1.*; *D. 45.1.72.pr.*; *D. 45.1.75.7.*; *C. 4.21.17.*; and *C. 4.49.4.* The wider question also drew into debate *C. 4.39.6.*; *D. 6.1.9.*; *D. 6.1.68.*; *I. 2.7.2.*; and *I. 4.6.32.*

### The Members of the Three Groups

#### I The Opponents of specific performance

##### 1) Glossators<sup>112</sup>

a) Non-delivery of the thing sold. Buyer's damages as the sole remedy were supported by Bulgarus, Johannes Bassianus, Azo, Hugolinus, and Rogerius.<sup>113</sup> Placentinus,<sup>114</sup> Odofredus,<sup>115</sup> Roffredus,<sup>116</sup> and later the canonist, Durantis (Speculator),<sup>117</sup> apparently favoured an alternative claim for delivery or damages.

b) Specific performance of *obligationes faciendi*. McCall concluded that Bulgarus's followers relied on *D. 42.1.13.1.* in rejecting specific performance of *obligationes faciendi*, though Accursius stated that, unless the *factum* was *tradere*, the plaintiff might choose performance or damages.<sup>118</sup> McCall later added that the glossators gave less thought "to the question of the general remedy for failure to perform *obligationes faciendi*."<sup>119</sup>

Dilcher,<sup>120</sup> however, surveyed a wider range of references and decided that, initially, damages were seen as the sole remedy. To *D. 42.1.13.1.* there were the exceptions for compelling the *arbiter* (*D. 4.8.3.*) and the *procurator* (*D. 3.3.35.3.*);<sup>121</sup> these were kept by the glossators.<sup>122</sup> Azo,<sup>123</sup> relying on *D. 3.3.35.3.* among other texts, gave the creditor of an *obligatio faciendi* the choice between performance and damages; and was apparently followed by Hugolinus<sup>124</sup> and Accursius himself.<sup>125</sup> An anonymous third group would restrict specific performance to those acts performable by someone other than the debtor: "Tertii distinguunt an possit per alium fieri et tunc praecise teneatur: alias non, ut [*C. 65.1.9.*]."<sup>124</sup>

## 2) Humanists

The majority of humanists, like the adherents of Bulgarus previously, concentrated on the Roman texts rather than on weighing extraneous considerations of equity and current law.<sup>126</sup>

a) **Non-delivery of the thing sold.** Nearly all humanists, French and subsequently Dutch, favoured damages as the buyer's only remedy: Alciatus;<sup>127</sup> Donellus;<sup>128</sup> Antonius Matthaeus I;<sup>129</sup> Wissenbach;<sup>130</sup> Böckelmann;<sup>131</sup> Johannes Voet;<sup>132</sup> Noodt;<sup>133</sup> and Schultingh.<sup>134</sup>

Duarenus in one passage showed some puzzlement over the relevance of the distinction between *dare* and *facere* to sale; found that *Corpus Iuris Civilis* texts gave the buyer damages only; argued "servile atque incivile esse, aliquem cogi aliquid manibus suis et corpore suo facere"; but conceded that the current law ("Receptum tamen est") allowed the buyer an action *ad rem restituendam* if possible.<sup>135</sup> Yet, in another passage, he revealed where his sympathies lay on the question whether the seller able to perform could be compelled to do so: "Et puto, quia in eo iudicio, quod bonae fidei est, spectatur maxime aequitas, officio iudicis interdum contineri, si rei venditae dominus possessorque sit venditor, ut ab eo auferatur et in emptorem transferatur."<sup>136</sup>

Antonius Faber's view oscillated.<sup>137</sup> As a young man of twenty-three, he followed his teacher, Cuiacius, in thinking that the buyer could have specific performance;<sup>138</sup> a view later disowned when Faber studied the *Corpus Iuris* texts.<sup>139</sup> Finally, as a judge he wrote a practitioner's book;<sup>140</sup> in the preface,<sup>141</sup> divergences from his previous three works are attributed to the fact that in "illis [the earlier works] nimirum quid nos sentiremus, scripsimus: hic quid alij. Illic quo iure utendum putaremus: hic quo uteremur." The seller might be compelled to perform.<sup>142</sup>

b) **Specific performance of obligationes faciendi.** Most humanists rejected specific performance of *obligationes faciendi*.<sup>143</sup> Antonius Faber, averse from the remedy in his humanist writings,<sup>144</sup> conceded that in the current law of Savoy "posse aliis quoque multis casibus cogi quem praecise ad factum...."<sup>145</sup>

## II The Proponents of specific performance

### 1) Glossators

a) **Non-delivery of the thing sold.** Meijers<sup>146</sup> showed that, according to the *Usus Feudorum* II.26.15.; II.7.1., the feudal vassal could compel delivery of possession by the lord; a rule contradicting Bulgarus's view of damages as the sole remedy. Craig had

already referred to the first passage.<sup>147</sup> McCall says that Martinus tried to reconcile Roman law and feudal law.<sup>148</sup> Reviewing Fischer's thesis, Meijers criticized the provenance of ideas:<sup>149</sup>

Of this author [Martinus], who among the Romanists was the first to come out strongly in favour of the real execution [reële executie]-- and, indeed, manu militari-- it is time and again averred: Martinus wished to bring the principles of the canon law and of the Lombardic law into effect. But for this, not a single proof is produced. Martinus never, by a citation or otherwise, gave evidence of knowing or wishing to follow Lombardic law. And notwithstanding several glosses and writings of Martinus and his school are known, only one gloss has been found in which the Decretum is cited.

Here Meijers is rather too fastidious. After all, he himself proved that Bartolus did not invent the rationalization of the seller's duty as partaking of *obligatio dandi* and of *obligatio faciendi*, but borrowed it, not from Petrus Jacobi as Fischer had thought, but from Jacobus de Arena.<sup>150</sup> Bartolus did not acknowledge his borrowing. Yet if we apply to Bartolus the argument which Meijers applies to Martinus-- that the influences on and aims of a writer can only be deduced from his acknowledgements and citations-- then we are led to conclude that Bartolus invented the rationalization.

Martinus did take a strongly equitable approach to the seller's duty of delivery: as Accursius records him, "Item et quod dicitur conventionem servandum"<sup>151</sup>-- one word away from "pactum servandum"; and he also asked, "si panem vendideris, te non tradenti mihi mortuo fame, quod interesse poterit praestari?"<sup>152</sup>

He was followed by Dinus;<sup>153</sup> Pillius (Pileus);<sup>154</sup> and probably Roffredus.<sup>155</sup>

The largely inscrutable glossator is Accursius, who for the most part writes as a compiling reporter rather than critic of his colleagues' opinions on the specific enforceability of sale. Dilcher quotes gloss *tradatur* on *I. 3.23.1.* as indicating where Accursius's sympathies lay;<sup>156</sup> but one still wonders, for there he just seems to be reiterating the circumstances in which Martinus's opinions will apply.

b) **Specific performance of obligationes faciendi.** McCall thinks that Martinus approved the specific performance of *obligationes faciendi*, both on the equitable ground already noted and on the ground that *D. 6.1.68.* covered both real and personal actions.<sup>157</sup> McCall later gives Pillius and Durantis as followers of Martinus's views.

## 2) Ultramontani

The ultramontani were French professors at Orleans (a centre for the training of clergy) and Montpellier who treated the law dialectically and with an eye on practice.<sup>158</sup>

a) **Non-delivery of the thing sold.** The ultramontani affirmed specific performance of the seller's duty to deliver.<sup>159</sup> Jacques de Révigny would grant the relief even though he classified *tradere* as *facere*;<sup>160</sup> and although he considered that broken obligations *faciendi* usually resolved into damages, he avoided self-contradiction by analysing the seller's obligation as successive, either to perform if possible or else to pay damages.<sup>161</sup> Similar views were expressed by Pierre de Belleperche<sup>162</sup> and Johannes Faber.<sup>163</sup>

Petrus Jacobi<sup>164</sup> repeated Bulgarus's view<sup>165</sup> but preferred that of Martinus.<sup>166</sup> To circumvent Bulgarus's "rigida et dura" opinion,<sup>167</sup> Jacobi distinguished with a metaphor: "sed potest dici, quod rem tradi, saltem ex causa venditionis, non est merum factum, sicut domum aedificari: immo fraternizat in aliquo, cum rem dari." Meijers<sup>169</sup> corrected Fischer's opinion<sup>170</sup> that Bartolus had taken this rationalization from Petrus Jacobi; and showed the source to be Jacobus de Arena, as acknowledged by Albericus a Rosate.

b) **Specific performance of obligationes faciendi.** McCall states that the ultramontani disagreed about the enforcement of *obligationes faciendi*.<sup>171</sup> He says that de Révigny favoured enforcement, subject to the defence of impossibility of performance.<sup>172</sup> Belleperche distinguished between acts delegable and non-delegable. Non-delegable acts were specifically enforceable from the debtor; but adjunction of a penalty allowed the debtor to escape.<sup>173</sup> Johannes Faber would allow specific performance, impossibility to be an exception.<sup>174</sup> Petrus Jacobi did not favour specific performance of *obligationes faciendi* in general;<sup>175</sup> nor did Jacobus de Arena.<sup>176</sup>

Dilcher reads de Révigny and Johannes Faber differently: in his opinion, both were against specific performance as a general rule,<sup>177</sup> though Faber allowed it in six exceptional instances.

## 3) Commentators

a) **Non-delivery of the thing sold.** Martinus's views on sale were followed by Cinus<sup>178</sup> and, in one text, Baldus.<sup>179</sup>

b) **Specific performance of obligationes faciendi.** Cinus<sup>180</sup> would enforce all obligations: "Praeterea conventiones, quae sunt bonae fidei servandae sunt"-- if

performance was possible. Dilcher, however, quotes another text indicating that Cinus would give damages for breach of *obligationes faciendi*.<sup>181</sup>

#### 4) Humanists

a) **Non-delivery of the thing sold.** Cuiacius overvalued the rediscovered *P.S. 1.13A.4.* as justifying specific enforcement of the duty to deliver,<sup>182</sup> and was followed (at least initially) by Antonius Faber and subsequently by the Dutchman, Westenburg.<sup>183</sup>

#### 5) The School of the "Usus Modernus Pandectarum"

These jurists, even if they were professors, tried to reconcile Roman law with current law, using the former to justify the latter, and, where this aim was impossible or impractical, jettisoning the former.<sup>184</sup>

a) **Non-delivery of the thing sold.** All agreed: the seller could be compelled to deliver.<sup>185</sup> They split on the reasons why:<sup>186</sup> one party followed Bartolus's middle way, but the other party eventually prevailing in Roman-Dutch law followed Martinus in declaring the competence of

b) **Specific performance of contracts generally.** This party numbered Corasius;<sup>187</sup> Covarruvias;<sup>188</sup> Caevallos;<sup>189</sup> Busius, whose words resemble Stair's, "Est ... creditoris electio utrum debitorem ad factum cogere an vero id quod interest malit postulare";<sup>190</sup> Bronchorst;<sup>191</sup> Corvinus;<sup>192</sup> Cyprianus Regneri ab Oosterga;<sup>193</sup> Groenewegen;<sup>194</sup> van Leeuwen;<sup>195</sup> Huber;<sup>196</sup> and van der Keessel.<sup>197</sup>

### III The Proponents of the middle way

#### 1) Commentators

Bartolus agreed with Martinus that the seller's obligation *tradere* could be specifically enforced,<sup>198</sup> and with Bulgarus, that *obligationes faciendi* resolved themselves, on breach, into damages.<sup>199</sup> To distinguish the seller's obligation from other *obligationes faciendi*, Bartolus averred that it

partem capit de natura obligationibus faciendi: et partem de natura obligationis dandi. sicut dicimus in grammatica quod participium capit partem de nomine, partem de verbo. Ita haec obligatio capit partem de uno, et partem de alio. Cum enim tradit rem, debet eam facere accipientis, si est dominus: et sic sentit de natura obligationis dandi. Si non est dominus, debet transferre usucapiendi conditionem: ... hoc est quod dicit in [D. 45.1.52.2.] ubi dicit quod obligatio, rem tradi, ex contractu venditionis non continet nudum factum, sed causam bonorum, i.[e.] proprietatem vel usucapiendi conditionem. ... Cum igitur ista obligatio sit participialis, eligitur quaedam media via: ut si habet rem, cogitur praecise tradere; et in hoc sapit naturam obligationis dandi. si eam non habeat liberatur solvendo interesse: et in hoc sapit naturam obligationis faciendi. sed si rem tradi esset in obligatione ex alia causa quam ex causa emptionis: tunc indistincte liberaretur solvendo interesse.

Here was the distinction pointed out by Craig.<sup>200</sup> As regards the seller's obligation, Bartolus was followed by the later commentators: Baldus,<sup>201</sup> Bartholomaeus a Saliceto (Salycetus);<sup>202</sup> Paul de Castro (Castrensis);<sup>203</sup> Porcius (Porcus or Portius);<sup>204</sup> Aretinus;<sup>205</sup> and Jason de Mayno.<sup>206</sup>

As regards *obligationes faciendi*, in general, Dilcher showed that the main rule on damages survived but that exceptions were made for specific performance of the *scriptor's* obligation; for *obligationes faciendi* which the debtor had sworn to perform; and the obligation *faciliter et de levi potest expedire*.<sup>207</sup>

## 2) Humanists

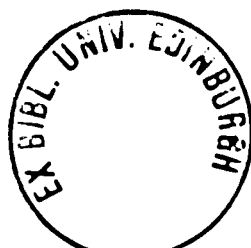
McCall<sup>208</sup> classifies Duarenus as a cautious follower of Bartolus.<sup>209</sup> We should perhaps add Paul Voet.<sup>210</sup>

## 3) The School of the "Usus Modernus Pandectarum"

The party which followed Bartolus numbered Schotanus;<sup>211</sup> Wesenbeck;<sup>212</sup> Bachovius;<sup>213</sup> Vinnius;<sup>214</sup> Zoesius;<sup>215</sup> Perezius;<sup>216</sup> and Pothier,<sup>217</sup> whose approach was adopted by the draftsmen of the Napoleonic *Code civil*.<sup>218</sup>

### Stair, Institutions 1.17.16.

We can now qualify Stair's gnomic proposition about the "common opinion of the doctors." The adjective "common" can mean "possessed or shared alike by both or all (the persons or things in question)."<sup>219</sup> As the survey has shown, however, the view that *obligationes dandi* but not *obligationes faciendi* were specifically enforceable is incorrect. Most *obligationes dandi* were so enforceable; the owner could vindicate his property *manu militari* from the possessor owing an *obligatio dandi*. Yet the



ultramontani made an exception for *obligationes dandi* based on innominate real contracts.

As regards *obligationes faciendi*, exceptions to Stair's proposition were made, even in the *Corpus Iuris Civilis*, for compelling the activities of the *arbiter* and the *procurator*; and the civilians, besides confirming these, would compel performance not only of the obligation of the *scriptor* for public utility, but also for the obligation easily performable. Reading "common" as "shared alike" in *Institutions* 1.17.16. produces the greatest error, though, since the *quaestio inter doctores celebris*-- whether delivery by the seller was compellable-- is ignored. It seems incredible, simply because of his civilian references elsewhere in the work, that Stair should have overlooked this classic controversy which had divided jurists and challenged their inventiveness since the days of the glossators, and which, once the distinction made famous by Bartolus entered French law, provided scope for misunderstanding among Louisiana lawyers in modern times.<sup>220</sup> The survey also brings out the fact that, although Continental legal systems are said to favour specific performance of sale, for hundred of years there was an initially dominant and latterly still a substantial body of opinion among Romanists that damages as the remedy for contractual breach were justified by conservative reading of the *Corpus Iuris Civilis* and also by the consideration that specific performance would result in servitude and civil strife; a view not too remote from the commanding principle of English equity that specific performance is excluded when damages suffice, or from the principle that contracts requiring parties to maintain a close personal relationship are not specifically enforced.

That this civilian attitude to damages was initially dominant and then later declined suggests another meaning of "common" for *Institutions* 1.17.16.: "In general use, of frequent occurrence; usual, ordinary, prevalent, frequent"<sup>219</sup> rather than "shared alike" would improve the accuracy of the text. As Hablo and Kahn state, "[A] criticism made of the post-glossators [the other name for the commentators] was that they tended to place undue weight on majority opinion-- *communis opinio doctorum*-- counting heads rather than weight."<sup>221</sup> Stair might have translated *communis opinio doctorum* literally as "the common opinion of the doctors." This doctrine worked on principles resembling those of judicial precedent.<sup>222</sup> Stair's proposition, thus interpreted, would reflect the view of most glossators and humanists, and even-- if considerable allowance is made for the metaphors and difficult distinctions concocted by the adherents of the middle way-- of most ultramontani and commentators, as well as one party of the school of the "*usus modernus Pandectarum*." Moreover, the shift of acceptance from the view of Bulgarus



to that of Martinus would illustrate the point that "the door to change was ... always left open, in the sense that a contrary opinion might be argued and accepted to produce a new *communis opinio*."<sup>223</sup> There is even authority for using "common" in the sense of "frequent": Caevallos<sup>224</sup> lists followers of the two main approaches to specific performance and qualifies both as "communior"; a description which, as there cannot be more than one majority opinion on a single issue, must confine the Latin adjective to a frequentative meaning, so that the English phrase would be "a common (or frequently held) opinion." This different translation would still attract criticism for omitting Martinus's views, which became the predominant law of Holland, even though mistaken by Grotius in one passage of the *Inleiding*,<sup>225</sup> criticized by Johannes Voet in the *Commentarius*,<sup>226</sup> and reluctantly accepted by Van der Linden,<sup>227</sup> who preferred the middle way perpetuated by Pothier. It is more difficult to understand why Stair gave this incomplete account of civilian debate on *obligationes faciendi*, when he could have cited doctors supporting his solution to the problem. Speculation throws up several ideas: plain error; an impatience with the minute distinctions of a debate not pithily summarized without risk of misstatement or obscurity, coupled with an avowed distaste for "the nauseating burden of citations"<sup>228</sup> which would assign jurists to the three groups outlined above; a resolve to dissuade his countrymen from confusing themselves in their straightforward approval of specific implement by wandering into an arena of *Corpus Iuris Civilis* uncertainty and conflict resulting in centuries of captious sophistry while Roman law was wrested to the service of the domestic current law of specific performance; or a stylistic, rhetorical purpose in emphasizing his solution with a bold, oversimplified contrast snappily rounding off a paragraph?

Whatever the competence of specific performance in Roman law, the great majority of statutes, judicial decisions, and jurists' writings on the current law of Holland affirmed the view which Stair recommended as "more suitable in equity." And the law of Holland became the law of South Africa.<sup>229</sup>

#### IV The Law of Holland<sup>230</sup>

The scope of specific performance before the Napoleonic codification is summarized by McCall:<sup>231</sup>

[A]ll contractual obligations, whether *dare* or *facere*, were specifically enforceable.<sup>232</sup> The rule *nemo potest cogi ad factum* formed no part of the law of Holland. If a judgment-debtor failed to perform the court's order for

specific performance, then coercion was brought to bear upon him by the indirect method of execution known as *gijzeling*.<sup>233</sup> Direct means of execution equivalent to *manus militaris* were unknown in Holland whether the subject matter of the dispute was movable or immovable.

The only defence to the plaintiff's claim was impossibility,<sup>234</sup> under which fell the defendant's insolvency.<sup>235</sup> The choice of remedies nearly always remained with the plaintiff.<sup>236</sup>

In ... sale, and presumably in other contractual obligations except marriage,<sup>237</sup> the plaintiff could choose between the remedies of damages and specific performance. The buyer could sue for delivery and damages for late delivery, being the difference between the purchase price and the value of the thing since the seller was *in mora*.<sup>238</sup> If the buyer did not want delivery he could sue for only the difference in price by way of damages.<sup>239</sup> Furthermore he could sue in the alternative for delivery and damages, and if the value of the goods had dropped, he could waive his claim for delivery.<sup>240</sup> The defendant had no choice in the matter,<sup>241</sup> neither would it appear that the court had any discretion except in the fixing of damages<sup>242</sup> or refusing of performance where it had become impossible. The seller could sue for the purchase price and interest and for an order compelling the plaintiff [this should read "defendant"] to take delivery.<sup>243</sup>

A lessee could sue for an order compelling the lessor to hand over possession.<sup>244</sup>

A donee could possibly sue for delivery of the donation.<sup>245</sup>

One who had partly performed his part of an innominate contract could compel the other party to perform.<sup>246</sup>

#### Notes

1. CRAIG, J.F. 2.2.22.
2. STAIR, INST. 1.17.16.
3. H.F.W.D. FISCHER, DIE GESCHIEDENIS VAN DE REËELE EXECUTIE BIJ KOOP (1934) (hence F).
4. K.R. McCall, Specific Performance in Roman-Dutch Law (unpublished B.Litt. thesis, Oxford University 1962) (hence M).
5. Groenewald, Specific Performance (hence G).
6. Dilcher, 78 Z.S.S. (Rom. Abt.) 277 (1961). See, also, the recent article by Du Plessis, 51 T.H. R.-H. R. 349 (1988).
7. J. MUIRHEAD, HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME 169 (3d ed., 1916); R. SOHM, THE INSTITUTES 252 n. 16 (3d ed., 1907); G 474-5.

8. M. KASER, DAS RÖMISCHE ZIVIL PROZESSRECHT 91 n. 20 (hence RÖM. ZIVIL.)
9. F 26 n. 2.
10. DE ZULUETA, THE INSTITUTES OF GAIUS Part II 264 (1953).
11. M 2.
12. L. WENGER, INSTITUTIONEN 136 n. 19 (1925).
13. L. WENGER, INSTITUTES 144 n. 19 (1955).
14. E. POSTE, GAI INSTITUTIONES 498 (4th revn., 1904).
15. G 477.
16. Von Lübtow, 68 Z.S.S. (Rom. Abt.) 320, 358-9 (1951).
17. T.C. SANDARS, THE INSTITUTES OF JUSTINIAN 452 (9th ed., 1898).
18. H.F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 211 (2d ed., 1952). The opinion has been removed by the editor of the 3d ed., 1972, Nicholas: 204-5.
19. G 479.
20. KASER, RÖM. ZIVIL 19.
21. MUIRHEAD, HISTORICAL INTRODUCTION 176-7.
22. G 478-9.
23. SOHM, INSTITUTES 239 n. 16.
24. *See*, also, KASER, RÖM. ZIVIL. 91, 94-104.
25. *Id.*, 96.
26. G 480-1; SOHM, INSTITUTES 288-9; WENGER, INSTITUTIONEN 135-6, 198-9; W.W. BUCKLAND, EQUITY IN ROMAN LAW 40-7 (1911); Dilcher, 78 Z.S.S., 278 and n. 8; KASER, RÖM. ZIVIL. 28 286-7.
27. KASER, RÖM. ZIVIL. 297, 300.
28. SOHM, INSTITUTES 288-9; A. PHILIPS, REËELE EXECUTIE 8 (1889); MUIRHEAD, HISTORICAL INTRODUCTION 330; W.W. BUCKLAND, ELEMENTARY PRINCIPLES OF THE ROMAN PRIVATE LAW 360-1 (1912); G 482-4. F. SCHULZ, CLASSICAL ROMAN LAW 37-8. *See*, also, the doubt of W.M. GORDON, STUDIES IN THE TRANSFER OF PROPERTY BY TRADITIO 7 (1970).
29. GAIUS, INST. 4.162-3.
30. G 485.
31. M 8 *et seq.*
32. KASER, RÖM. ZIVIL. 392 and n. 12.
33. *Id.*, 406.
34. *Id.*, 406-7.
35. Dilcher, 78 Z.S.S., 278; G 490.
36. G 491-2.
37. Supporters: WENGER, INSTITUTIONEN 294-5; MUIRHEAD, HISTORICAL INTRODUCTION 352; Beinart, 69 S.A.L.J. 145, 158 (1952); Dilcher, 78 Z.S.S., 278 n. 9.
38. O. LENEL, PALINGENESIA IURIS CIVILIS No. 2987 nn. 3,4 "si quidem" to "potest restituere", and the last sentence (1889); M 16.

39. Dawson, 57 MICH. L. REV. 495 (1959), 501 n. 15 gives one interpolation: "si quidem" to "potest restituere". M 15 gives three: Dawson's and also "in infinitum" and the last sentence.
40. F 31.
41. PHILIPS, REÈELE EXECUTIE 32-3.
42. M 19.
43. G 493.
44. "Restituere" does not appear in this text.
45. G 497.
46. M. RADIN, HANDBOOK OF ROMAN LAW 169 (1927).
47. Meijers, 15 T. v. R. 113 (1936).
48. This text states only that the buyer has the action *ex vendito*, without specifying what relief he will be awarded.
49. W.W. BUCKLAND & A.D. McNAIR, ROMAN LAW AND COMMON LAW 329 (1936).
50. G 501.
51. Meijers, 15 T. v. R., 113.
52. G 502-7.
53. G 505 criticizes Philips's view (REÈELE EXECUTIE 14-5) for this reason.
54. I. 4.6.31.; by analogy, D. 4.3.18.; D. 13.4.4.1.
55. G 506-7.
56. E. FRY, SPECIFIC PERFORMANCE 3-4 (3d ed., 1892); Gross, 57 S.A.L.J. 347 (1934).
57. G 507.
58. F 24-33.
59. G. NOODT, Commentaria, D. 19.1.
60. G 508-9.
61. G 486-7.
62. P.F. GIRARD, TEXTES DE DROIT 488 *et seq.* (4e éd., 1913).
63. BUCKLAND & McNAIR, ROMAN LAW AND COMMON LAW 328.
64. P.F. GIRARD, MANUAL ÉLÉMENTAIRE DE DROIT ROMAIN 587 (8. éd., 1929).
65. A. SCHULTINGH, JURISPRUDENTIA VETUS ANTE-JUSTINIANEA, P.S. rec. 1.13A.4. n.12.
66. F. SCHULZ, ROMAN LEGAL SCIENCE 176 *et seq.* (1946).
67. M 33-4. 1 E. LEVY, *Vulgarization of Roman Law in the Early Middle Ages*, GESAMMELTE SCHRIFTEN 220 does not mention P.S. 1.13A.4.
68. M 36-54.
69. E. LEVY, WEST ROMAN VULGAR LAW (1951).
70. M 37.
71. M 39; LEVY, W. ROM. VULGAR LAW 10.
72. M 39-40.

73. M 40.
74. M 41.
75. M 42.
76. M 42-3.
77. M 43.
78. LEVY, W. ROM. VULGAR LAW 127.
79. M 44.
80. LEVY, W. ROM. VULGAR LAW 129.
81. M 45-6.
82. LEVY, W. ROM. VULGAR LAW 133.
83. M 46-7.
84. M 47.
85. M 48-50.
86. M 51.
87. M 55, chapter heading.
88. F Ch. III.
89. S.J. FOCKEMA ANDREAE, *Het recht van den kooper in het oude Nederland*, in *BIJDAGEN TOT DE NEDERLANDSCHE RECHTSGESCHIEDENIS*, Vol. 5, 284 (1914).
90. Canon Law, *supra* pages 13-8.
91. F 167, 173-9.
92. F ch. IV, Part 1.
93. M ch. IV.
94. Dilcher, 78 Z.S.S., 783 *et seq.*
95. M 221-2.
96. M 101-2.
97. F 119.
98. M 102.
99. M 103.
100. Dilcher, 78 Z.S.S., 279.
101. *Id.*, 279-80.
102. Dilcher, 78 Z.S.S. 283, 290.
103. *Id.*, 283-4.
104. *Id.*, 291 and n. 62.
105. *Id.*, 292-3 and nn. 67-9.
106. *Id.*, 293.
107. *Id.*, 298, 300.
108. M 103; F 128-9; Dawson, 57 MICH. L. REV. 495, 503.
109. Accursius, gl. *obligationibus*, D. 42.1.13.1.
110. BARTOLUS, COMMENTARIA, D. 19.1.1.pr.n. 12; D. 45.1.72.n. 39; Dilcher, 78 Z.S.S., 299.

- 111. M 107.
- 112. M 129-31; F 123-8.
- 113. gl. *agitur*, D. 19.1.1.pr.; gl. *spopondit*, D. 18.1.25.1.; gl. *certi esse*, D. 45.1.75.10.; gl. *vel id quod emptoris*, C. 4.21.16.; gl. *praestare*, C. 4.39.6.; gl. *procacia*, C. 4.49.4.; gl. *in aliis autem casibus qui incerti*, C. 7.47.; Vetus Collectio § 30, § 409 in DISSENSIONES DOMINORUM; AZO, SUMMA AUREA, C. 4.49.4. nn. 6,7; C. 7.47. n. 8.
- 114. Placentinus, De personalibus actionibus, Tit XXII (de actione empti et venditi) p. 41 verso, n. 3 in TRACTATUS ILLUSTRUM ... IURIS CONSULTORUM DE IUDICIJS, Tom. III Pars II. For a contrary suggestion that he allowed the defaulting seller the choice of remedies: Dilcher, 78 Z.S.S., 288 and n. 50.
- 115. ODOFREDUS, SUMMA DE LIBELLIS FORMANDI, "De actione ex empto."
- 116. Roffredus Benevantis, Libelli Iuris Civilis Pars. Quarta LXXV - "De actione ex empto" in CORPUS GLOSSATORUM IURIS CIVILIS, Vol. VI p. 148-50.
- 117. DURANDIS, SPECULUM IURIS Lib. IV par. III (M 128-9; F 136-8).
- 118. M 129.
- 119. M 222.
- 120. Dilcher, 78 Z.S.S., 285-7.
- 121. *Id.*, 282.
- 122. *Id.*, 285 n. 43.
- 123. AZO, SUMMA C. 7.47. n. 8.
- 124. gl. *obligationibus*, D. 42.1.13.1.
- 125. gl. *in aliis autem casibus qui incerti*, C. 4.47.
- 126. F 181, 182.
- 127. ALCIATUS, de Verborum obligationes in OPERA OMNIA Tom. II, p. 526 (F 182).
- 128. H. DONELLUS, OPERA OMNIA Tom. 3 p. 795, De jure civili Lib. XIII cap. II. iv. (M 164-9, F 183-4).
- 129. A. MATTHAEUS I, NOTAE ET ANIMADVERSIONES I.III.24 (M 177; F 193).
- 130. J.J. WISSENBACH, COMMENTATIONES, C. 4.49.4.; EXERCITATIONES, D. 19.1.1. disp. 37, nn. 2 *et seq.* (noting that it was "usus fori" that the seller was specifically compellable); DISPUTATIONES Disp. 35 (De emptione et venditione) I, n. 20 (F 193-4).
- 131. J.F. BÖCKELMANN, COMPENDIUM INSTITUTIONUM ... JUSTINIANI, Inst. 3.24. n. 8 (F 194).
- 132. J. VOET, COMPENDIUM IURIS 19.1.4.; COMMENTARIUS AD PANDECTAS 19.1.14.; 6.1.20.; 46.3.10.; 45.1.8. (M 179-86; F 193-4).
- 133. NOODT, Comm. D. 19.1. in OPERA OMNIA Vol. II, 419-20 (F 196; M 186-8).
- 134. A. SCHULTINGH, NOTAE, D. 19.1.1.; THESIUM CONTRAVERSIVM DECADES CENTUM Dec. 68, par. 4; JURISPRUDENTIA, P.S. recep. 1.13A.4. n. 12. (pp. 247-8).
- 135. F. DUARENUS, De actionibus empti et venditi, OPERA OMNIA pp. 1025-6. (F 182-3; M 161-4).

136. *Id.*, De verborum obligationibus, p. 753.
137. F 186-91.
138. A. FABER, CONIECTURARUM Lib. VI, cap. XVII.
139. A. FABER, CHILIAS ABSOLUTA Tom. IV, Decad. LXXXV, Error III; RATIONALIUM Tom. V, p. 448-50, D. 19.1.1. (M 173-4).
140. A. FABER, CODEX FABRIANUS.
141. *Id.*, Lecturi suo.
142. *Id.*, Lib. II. tit. 3. def. 11. (M 174-5).
143. M 175-6, 222.
144. FABER, RATIONALIUM Tom. II, D. 8.5.6.2., D. 9.4.29.; Tom. V, D. 19.1.1.
145. FABER, CODEX 2.3.11.
146. Meijers, 5 R.I.D.A. 183, 197 (1950).
147. CRAIG, J.F. 2.2.22.
148. M 114.
149. Meijers, 15 T. v. R., 115 and n.
150. Meijers, *supra* page 49.
151. gl. *agitur*, D. 19.1.1.pr.
152. DISSENSIONES DOMINORUM, § 60; Dilcher, 78 Z.S.S., 288-9; M 115; F 129-30.
153. Dinus, referred to by BARTOLUS, COMM., D. 19.1.1.; D. 45.1.72.; (F 130).
154. PILEUS, QUAESTIONES AUREAE Quaest. 116 (M 120-2; Dilcher, 78 Z.S.S., 289).
155. M 129; Dilcher, 78 Z.S.S., 287.
156. Dilcher, 78 Z.S.S., 290.
157. M 117-20.
158. F 138-40; M 132-4.
159. M 147.
160. J. DE RÉVIGNY, in PETRI DE BELLA PERTICA, LECTURA SUPER PRIMA PARTI CODICIS, C. 4.49.10. (M 134-5).
161. Dilcher, 78 Z.S.S., 295.
162. P. BELLAPERTICA, QUAESTIONES Quae. LIV. fol. 39 (M 137-8).
163. F 141-7; J. FABER, BREVIARIUM, C. 4.49.4. n. 3 (p. cxlvj) (M 142).
164. F 147-51.
165. P. JACOBI, AUREA PRACTICA, Rubrica LXXXII De actione ex empto no. 1 (M 143, F 147-8) and Rubrica XXXIII De actione ex empto, Libellus melior et aequior no. 4 (p. 345).
166. *Id.*, Rubrica LXXXIII nn.1, 2 ("aequiozem opinionem") (M 143-4, F 148-9).
167. *Id.*, Rub. LXXXIII no. 4.
168. *Id.*, n. 5.
169. Meijers, 15 T. v. R., 110-1; M 145-7.
170. F 150.

171. M 147.
172. M 135.
173. M 135-6.
174. M 139.
175. M 143.
176. M 146.
177. Dilcher, 78 Z.S.S., 293, 295.
178. CINUS, LECTURA, C. 4.49.4. (M 151, F 155).
179. BALDUS, IN QUARTUM ET QUINTUM CODICEM LIBROS PRAELECTIONES, C. 4.49.4. (p. 110 verso) (F 162, M 158).
180. CINUS, LECTURA C. 4.49.4.
181. Dilcher, 78 Z.S.S., 297.
182. J. CUIACTUS, OPERA Tom. I, col. 212B-C (M 170-1).
183. O.W. WESTENBURG, PRINCIPIA IURIS Lib. 19. tit. 1, para. 12 (We infer the link from the citation of P.S. 1.13A.4.) (M 176, F 185-6).
184. M 189-91; F 197-9.
185. M 191.
186. F 198-9.
187. J. CORASIUS, Miscellaneorum iuris civilis libri VII, Lib. II, cap. III, in OPERA Vol. II, pp. 207-9. (M 208-9; F 199).
188. D. DE COVARRUVIAS, Variarum resolutionum Lib. II. cap. 19, in OPERA OMNIA Tom. II, pp. 172-4 (M 209, F 199-200).
189. H. DE CAEVALLOS, SPECULUM AUREUM Quæ. 459. (F 200).
190. P. BUSIUS, COMMENTARIUS IN PANDECTAS, D. 42.1.13.1. (*ob. fac.*) Tom. II, p. 373; D. 19.1.1.pr. (sale) Tom. I, p. 601 (M 210; F 200-1).
191. E. BRONCKHORST, ENANTIOΦΑΝΩΝ, Centuriae sex, et conciliationes Eorundem, Cent. II. Assert. XLI (*ob. fac.*); cent. II. Assert. LVIII (sale) (M 211-3, F 201-2).
192. J.A. CORVINUS, ENCHIRIDION I. 3.16. (p. 280) (*ob. fac.*); I. 3.24. (p. 306) (sale) (M 214-5, F 202).
193. CYPRIANUS REGNERI AB OOSTERGA, CENSURA BELGICA ... IN PRIORIBUS XXV LIBRIS PANDECTARUM ... D. 19.1.1. (p. 458-9) and disputationes iuridicae, disp. 29, thesis VII, para. 3 cp. 132); CENSURA BELGICA ... IN DUODECIM LIBRIS CODICIS, C. 4.49.4. (p. 175) and disp. 15, thesis VII (p. 57): Sale. For *obligationes faciendi*: M 215-6; F 203-4.
194. S. VAN GROENEWEGEN VAN DER MADE, TRACTATUS DE LEGIBUS ABROGATIS, D. 42.1.13.1. (all obligations); C. 4.49.4. (sale); C. 5.1.1. (marriage) (M 217-8, F 204-5).
195. S. VAN LEEUWEN, CENSURA FORENSIS 4.13.12. (all *obligationes faciendi*); 4.19.10. (sale) (M 218-9, F 205-6).
196. U. HUBER, PRAELECTIONUM, I. 3.16.6. (*ob. fac.*); I. 3.24.4. (sale) (M 220, F 206-7).
197. D.G. VAN DER KESSEL, THESES SELECTAE Th. 512 (*ob. fac.*) (M221); PRAELECTIONES, Inl. 3.3.41. (Vol. IV p. 127-9) (sale and all *obligationes faciendi*) (F 208-9).



198. BARTOLUS, COMM. D. 19.11.pr.n.12; D. 45.1.72.n.39; Dilcher, 78 Z.S.S., 299.
199. BARTOLUS, COMM., D. 19.1.1.nn.12-13; Dilcher, 78 Z.S.S., 298-9.
200. CRAIG, JUS FEUDALE 2.2.22.
201. BALDUS, IN PRIMAM DIGESTI VETERIS PARTEM COMMENTARIA D. 19.1.1.pr. (p. 140) (M 158-9, F 162-3).
202. BARTHOLOMAEUS A SALICETO, In Tertium et Quartum Codicis Libros in OPERA OMNIA (Tom. I, Pars Secunda pp. 1034-5), C. 4.49.4. (M 159, F 163).
203. PAUL DE CASTRO, Lectura super secunda parti Digesti veteris, in OPERA OMNIA (Vol. 1, p. 100 *verso*), D. 19.1.1. (M 160); though F 164 and Dilcher, 78 Z.S.S., 300 have him also following Baldus, C. 4.49.4. (Vol. IV, p. 193 *verso*) on sale.
204. I.C. PORTIUS, PAPIENSIS IN TRES PRIORES INSTITUTIONUM IMP. IUSTINIANI LIBROS, I. 3.23.n.14 (M 160, F 164).
205. ANGELO ARETINUS, OPUS PRAECLARUM, I. 3.23.1. nn.12-13; Dilcher, 78 Z.S.S., 300.
206. J. MAYNUS, COMMENTARIA D. 45.1.72.pr.n.35; Dilcher, 78 Z.S.S., 300.
207. Dilcher, 78 Z.S.S., 301-2.
208. M 232.
209. Duarenus: *supra* page 47.
210. P. VOET, COMMENTARIUS, I. 3.24.no.8. (Pars II, pp.232-3).
211. B. SCHOTANUS, EXAMEN JURIDICUM, D. 45.1.19. (p. 583) (*ob. fac.*); D. 19.1.1. (p. 299) (sale) (M 194-5, F 209-10); DISPUTATIONES JURIDICAE, Disp. 37 thesis 31 (sale specifically enforceable; yet ratio dubitandi IV was that "Ad factum nemo compellitur [D. 42.13.1.]. Tradere vero est facti." (F 210).
212. M. WESENBECK, PARATITLA, D. 19.1.1 (sale). Yet he rejected specific performance of sale in TRACTATUS ET RESPONSA, QUAE VULGO CONSILIA JURIS APPELLANTUR, Pars I. cons. 42, no. 100 (F 212).
213. R. BACHOVIVS ECHTIUS, NOTAE, Vol. I. disp. 28, thesis II, lit. C. (sale); Vol. II, disp. 27, thesis I, lit. L (*ob. fac.*); EXERCITATIONES, Dec. 85, err. 4 (p. 206-8).
214. A. VINNIUS, INSTITUTIONUM, I. 3.16.7.n.3 (*ob. fac.*); I. 3.24.pr.nn.3-7 (sale); JURISPRUDENTIAE, Lib. II, cap. 35 (M 198-200, F 213-5).
215. H. ZOESIUS, COMMENTARIUS, D. 19.1.1.nn.12-15 (sale) (M 200-1, F 215-6).
216. A. PEREZIUS, PRAEELECTIONES, C. 4.49.4.nn.3-4 (M 201); COMMENTARIUS, D. 19.1.1. (p. 311) (F 216).
217. R.J. POTHIER, Traité des obligations nos. 141, 156; Traité du contrat de vente no. 68; Traité du contrat de louage no. 66 (M 202-5), in OEUVRES (M. Bugnet (ed.)).
218. F 217-220.
219. 2 OXFORD ENGLISH DICTIONARY 668.
220. Misunderstanding in Louisiana law: *infra* pages 356-7.
221. H.R. HAHLO & E. KAHN, THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND 495.
222. O.F. ROBINSON, T.D. FERGUS, & W.M. GORDON, AN INTRODUCTION TO EUROPEAN LEGAL HISTORY 115.

223. *Id.*, 115.
224. CAEVALLOS, SPECULUM AUREUM Quae. 459.
225. H. DE GROOT, INLEIDING 3.3.41.
226. J. VOET, COMM. 19.1.14.
227. J. VAN DER LINDEN, RECHTSGELEERD, PRACTICAAL, EN KOOPMANSHANDBOEK 1.14.b. (p. 122) (M 320); and his translation of Pothier's treatise on obligations: J. VAN DER LINDEN, R.J. POTHIER, VERHANDELINGEN VAN CONTRACTEN EN ANDERE VERBINTENISSEN No. 157 note (M 323-4).
228. STAIR, INSTITUTIONS "Dedication to the King."
229. HAHLO & KAHN, S.A. LEGAL SYSTEM 562: "Roman-Dutch law was the law of the province of Holland." Holland as the richest province was most influential in the affairs of the Dutch East India Company, which colonized the Cape of Good Hope: *id.*, 571-2. Roman-Dutch law spread to the Transvaal, Orange Free State, and Natal: *id.*, 575-6 and n. 52. "All things being equal, the courts will prefer the views of the writers of Holland to those of Friesland, Utrecht and the other provinces, and the views of any of the Dutch writers to those of France, Germany or Spain": *id.*, 580, citing Tjollo Ateljees (Eins.) Bpk. v. Small 1949 (1) S.A. 856 (A), where Van den Heever J.A., faced with conflicting authorities, held at 865: "Since we observe the law of Holland we must exclude the Romanists of other countries as well as the pragmatists from neighbouring regions."
230. For the law of *reële executie* in sale throughout the other provinces of the Netherlands, see F 222-60, 305-6. Huber is mentioned because "though he wrote on the law of Friesland, [he] has always been regarded as an authority in Holland" (HAHLO & KAHN, S.A. LEGAL SYSTEM 556), so has influenced South African law.
231. M 324-8.
232. *Decisions*: P. CHRISTINAEUS, DECISIONES Vol. I, decis. 323, n. 8 (all obligations: a very important reference, often cited by jurists) (M 256-7); Vol. I, decis. 324, nn. 8-9 (sale). But see, by contrast, Vol. III decis. 75, n. 5; decis. 61, n. 2. F 312 n. 1. remarks that Christinaeus's expositions are by no means over-clear.

For the competence of the remedy, see C. VAN BYNKERSHOEK, OBSERVATIONES TUMULTUARIAE No. 44 (the seller's obligation *tradere* is *facere*) (M 262).

*Jurists*: H. DE GROOT, INLEIDING TOT DE HOLLANDSCHE RECHTS-GELEERTHEYD 3.3.41., denying the competence of the remedy, clashes with 3.31.9., 3.15.6.; 3.15.1., and has been criticized as misstating the Roman-Dutch law: see the authorities mentioned by M 279-80.

For the competence of the remedy, see GROENEWEGEN, DE LEGIBUS ABROGATIS D. 42.1.13.1. ("Hodie in omnibus faciendi obligationibus praecise ad factum cogi potest, neque solvendo interesse liberatur promisor, qui faciendi facultatem habet"); C. 4.49.4. (sale). VINNTUS, COMM. I. 3.16.7.n. 3. P. VOET, COMM. 4.24.9. (M 290, F 264). S. VAN LEEUWEN, R.-H.R. 4.11.13. (M 292-3); CENSURA FORENSIS 4.13.12.; 4.19.10. U. HUBER, H.R., V. 40.38. (M 300-1); III 21.77-79 (M 301-2). § 79 reads: "But since it is often not convenient for the plaintiff to worry so long about compelling [the defendant] to do what he does not want to do, it commonly results in a claim for damages and interest; ... though on the other hand it does not follow from this that the promisor of an act cannot be compelled to fulfil it, if the promisee wishes to

insist on that, and the matter is still *res integra*, since there is certainly no reason why it should be more permissible to break faith in deeds than in things."

J. VOET, COMM. 19.1.14. states the law as recorded by Neostadius and others and then criticizes its justification. He is in turn criticized by M 305-6, Gane in Vol. 3, p. 373 of his translation, and Groenewald, Specific Performance 538-40. See, also, VOET, COMM. 42.1.35.; 42.1.36.; 42.3.4. (which M 307 calls a rather confused passage; Roman law is contrasted with current law).

VAN DER KESSEL, THESES SELECTAE Th. 512.

B.K. Tooling (Edms.) Bpk. v. Scope Precision Engineering (Edms.) Bpk. 1979 (1) S.A. 391 (A) 433 *per* Jansen J.A.

233. South African law having adopted imprisonment for contempt of court from English law, the Roman-Dutch law of *gijzeling* is of historical interest for the purposes of my thesis. An important study is I.C. STEYN, THE HISTORICAL DEVELOPMENT OF THE MODE OF PROCEEDING IN 'GIJZELING' IN THE PROVINCIAL COURT OF HOLLAND FROM 1531 (1939). M 236-9 considers that the Dutch old authorities and Fischer often confuse two separate questions: the judicial basis for ordering or refusing specific performance of the contract; and the subsequent procedure on the means of enforcing the order of specific performance. At least the references to *gijzeling* show that the means of enforcement existed in Roman-Dutch law.

For failing to pay a money judgment, the debtor was liable to *arrest* (or *apprehensie op de persoon*). For failing to perform a judgment for an act, he was liable to *gijzeling*. *Arrest* and *gijzeling* were species of civil imprisonment (STEYN, 'GIJZELING' 4, quoted by M 241). Further, *gijzeling* was competent for enforcing judgments for acts other than those based on contract: for example, to render an account (VAN LEEUWEN, CENS. FOR. 2.1.33.30.); to revive an action (STEYN, 'GIJZELING' 32-3); or to undertake the duties of a judgment - appointed guardian (DE GROOT, INL. 1.7.15.; VAN LEEUWEN, R.-H.R. 1.16.5.).

. Statutes mentioning *gijzeling*: (M 244-55) *e.g.*: Arts. 14 to 16, Nieuwe Ordonnantie oft Ampliatie, vande Instructie vanden Hove van Hollandt, 21 December 1579 (GROOT PLACAET-BOECK, 5 Boeck. 2. Tit. 3. Deel (Volume II of the Advocates' Library copy, p. 770)) (1664).

Arts. 31, 32, Ordonnantie, vande Institutie, binnen den steden ende ten platten Lande van Hollandt, 1 April 1580 (G. P.-B., 5 Boeck. 2 Tit. 2. Deel (Vol. II, p. 702-3)).

Arts. 36, 39, Reglement, waer nae de Exploictiers ofte Deurwaerders van den Hove van Hollandt, haer in het doen van hare Exploicten voortaeen sullen hebben te reguleren, 28 Maert, 1680 (G.P.-B. Placaaten 5. Boeck. 1. Tit. (Vol. III, p. 359 - the numbering of the surrounding pages in the Advocates' Library copy shows "359" to be a misprint for "659")); and other legislation cited in F 293 n. 5. The writers of Holland also made comparative references to the Costumen van Antwerp (M 250-5). Holland's writers gave *gijzeling* as the form of execution for specific performance of obligations to do. Decisions mentioning *gijzeling*: C. NEOSTADIUS, UTRIUSQUE HOLLANDIAE ... DECISIONES decis. 50, the uninterpolated first paragraph. VAN BYNKERSHOEK, OBS. TUM. No. 44 (M 262-3), No. 1189 (M 264), No. 337 (M 267); No. 1964; No. 1418; No. 1499; No. 1605; No. 695 (*gijzeling* withheld: the lease had expired); No. 1712; No. 1316 (rendering of an account) (M 269-74).

Jurists: GROENEWEGEN, DE LEGIBUS ABROGATIS, D. 42.1.13.1. references (M 287-9). VINNIUS, COMM. III.16.7.n.3, especially the citations (M 289-90). P. VOET, COMM. IV. 24.9. (M 290-1). VAN LEEUWEN, R.-H.R. 4.11.13.; 4.26.20.; 4.14.no. 3; 4.18.1.; 4.25.1. (M 292-7). J. VOET, COMM.

19.1.14. esp. references; 42.1.35.

234. *Note* the words in the title to NEOSTADIUS, DECISIONES No. 50: "qui rei tradendae facultatem habet" (M 259-60); and *see*, also No. 82 (cargo destroyed without defendant's fault) (M 260-1). Further, VAN BYNKERSHOEK, OBS. TUM. No. 704 (M 264), No. 695 (lease had expired) (M 272). GROENEWEGEN, DE LEGIBUS ABROGATIS D. 42.1.13.1. (M 287), C. 4.49.4. (M 288); P. VOET, COMM. IV. 24.9. (M 290-1); VAN LEEUWEN, R.-H.R. 4.14.3., 4.; 4.18.1. (M 295-6); HUBER, H.R. V. 40.38. (M 300-1).
235. VAN BYNKERSHOEK, OBS. TUM. No. 810; J. VOET, COMPENDIUM 19.1.8.; 23.1.7.
236. M 324-5.
237. M 313 suggests that the lack of a damages alternative to specific performance is what L.C. Kramp, supposed author of the anonymous *Aanmerkingen* to A. LYBRECHT, REDENEREND VERTOOG OVER 'T NOTARIS AMPT, Part 1, Ch. V, p. 41-2 may have intended by the words "Edoch, ik meen dat als er by ons in een Trouwbelofte een poenaliteit was gestipuleerd, de contumaceerende, onder de voldoening van de poenaliteit, de praecise praestatie van het faict, dat is het voltrekken des Huwelyks, kan declineeren en ontgaan" (M 313). This might be translated as "Yet, I opine that if with us a penalty had been stipulated in a promise of marriage, the contumacious [person] can, subject to the satisfaction of the penalty, decline and escape the precise performance of the act, that is, the conclusion of the marriage."

H.R. HAHLO, THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE 12 (5th ed., 1985) discusses the enforcement of engagements in Roman-Dutch law: "Betrothals gave rise to a reciprocal obligation on the part of the betrothed to marry each other which (if the defaulter had not married someone in the mean time [an example of impossibility of performance]) could be enforced by civil imprisonment [STEYN, 'GIJZELING' showed that *gijzeling* was part of but not identical with civil imprisonment]; alternatively, the court could appoint a proxy (apparitor) who would go through the marriage ceremony on behalf of the reluctant bridegroom." In note 74 Hahlo's citations include H. BROUWER, DE JURE CONNUBIUM 1.24.20.; J. VOET, COMM. 23.1.12.; VAN LEEUWEN, CENS. FOR. 1.1.11.26.; R.-H.R. 4.25.1.; VAN DER LINDEN, RECHTSGELEERD ... KOOPMANSHANDBOEK 1.3.2.; VAN DER KESSEL, THESES SELECTAE Th. 57.

*See*, also, CHRISTINAEUS, DECISIONES Vol. 3, decis. 124. no. 44 (M 257-8); VAN BYNKERSHOEK, OBS. TUM. No. 1712 (marriage by proxy ordered) (M 272-3); No. 1763 (marriage by proxy refused; it is confined to the defendant betrothed's sickness or absence (M 273); GROENEWEGEN, DE LEGIBUS ABROGATIS, C. 5.1.1. (M 288).

Two Scots jurists contrasted their own country's law with that of Holland: H. HOME (LORD KAMES), ELUCIDATIONS 32; ERSKINE, INST. 1.6.3.

Holland's law on specific performance of betrothals was received in South Africa: Joosten v. Grobbelaar (1832) 1 Menz. 149; Greef v. Verreux (1829) 1 Menz. 151; Gray v. Rynhoud (1832) 1 Menz. 150. Specific performance was later abolished, and damages were made available as the sole sanction for breach of engagement to marry: Marriage Order in Council of 1838 (Cape), s. 19; Ordinance 17 of 1846 (Natal), s. 19. Law 3 of 1871 (Transvaal), s. 17; Law 26 of 1899 (Orange Free State), s. 20: HAHLO, HUSBAND AND WIFE 55 and nn. 73-4.

238. VAN BYNKERSHOEK, OBS. TUM. No. 44, No. 227 (M 262-3); VAN LEEUWEN, R.-H.R. 5.19.14.
239. VAN BYNKERSHOEK, OBS. TUM. No. 1461 (M 26).
240. *Id.*, No. 44 (M 262-3).
241. CHRISTINAEUS, DECISIONES Vol. 1, decis. 323, no. 8; Vol. 3, decis. 75. n. 5 (M 256-7); NEOSTADIUS, DECISIONES Decis. 50 (the uninterpolated first paragraph) (M 259-60); VAN BYNKERSHOEK, OBS. TUM. No. 704 (the buyer's choice); No. 1459 continuing No. 1420; No. 1461 (buyer's choice); No. 337; No. 1509; No. 1823 (M 264-9).  
*Jurists:* DE GROOT, INL. 3.31.9.; 3.15.6.; per contra, 3.3.41. (obligations to do are soluble by payment of damages; opinion attacked by other jurists): HUBER, PRAELECTIONUM 2.19.1.5. (M 282 n. 53; F 261); H.R. III.21.79.; III.2.9., 10 (M 302-3); J. VOET, COMM. 19.1.14. (M 282 n. 53, F 261).
242. VAN BYNKERSHOEK, OBS. TUM. No. 1420. The *Hooge Raad* ordered specific performance or damages based on the price at the delivery date. Alternative damages were eventually awarded because the whalebones had risen in price beyond that agreed under the contract; so, by receiving the goods, the buyer would make a profit, not suffer loss (M 264-5).
243. VAN BYNKERSHOEK, OBS. TUM. No. 1418, No. 1499 (the seller sued the buyer for payment of the price; this should theoretically have been enforceable by *arrest*, but *gijzeling* was ordered: for discussion, see M 270-2); DE GROOT, INL. 3.15.1. (M 271, 284-5); VAN LEEUWEN, R.-H.R. 4.17.9. (M 271, 296-7).
244. VAN BYNKERSHOEK, OBS. TUM. No. 695 (the particular lease had expired; but the principle was acknowledged) (M 272).
245. M 285 remarks that DE GROOT, INL. 3.2.14. "would appear to say that the donor is bound to deliver, though he does not actually say that [the donor] could be compelled to do so."
246. DE GROOT, INL. 3.31.9. (M 281); VAN LEEUWEN, R.-H.R. 4.14.3. (M 294-5).

**PART II**

### Chapter 3: The General Right to the Remedy; and the Court's Discretion

The principle established in the writings of the Scots old authorities<sup>1</sup> on the creditor's general right to enforce implement of the contract has been continued in the leading cases; but with the important qualification, not expressed in the old writings, that the court may exercise a discretion to refuse the remedy in certain circumstances which may be grouped under the general headings of practicability and fairness.

The chief decision in the modern law was delivered by the House of Lords in *Stewart v. Kennedy*.<sup>2</sup> The heir of entail in possession of a Perthshire estate sold it to a New York banker, Kennedy. A contractual term subjected the sale to the ratification of the court-- important in the procedure for disposing of the estate under the entail legislation which form the main part of the case; but not for the theory of specific implement. The heir in line to succeed having objected to the proposed sale, Kennedy claimed declarator of the seller's obligations, and implement so that Stewart should be ordained to apply for judicial approval of the transfer and then dispoise the estate. Failing such implement, Stewart should be ordained to pay damages.<sup>3</sup>

The First Division found Stewart contractually obliged to make the necessary application to court. Lord President Inglis proposed that a conveyancer should be specially appointed to draft a conveyance which the court could then approve.<sup>4</sup> With him Lords Mure, Shand, and Adam agreed. None for a moment doubted the competence of Kennedy's action.

Stewart's appeal to the House of Lords failed. The legislation was held applicable and the contract valid. Lord Watson's speech, as that of the only Scots judge present, carries particular weight; but those of the English Lords Herschell and Macnaghten also confirmed the principles of Scots law and showed no desire to introduce restrictive notions of English equity. Lord Watson expounded Scots law as follows:<sup>5</sup>

I do not think that upon this matter any assistance can be derived from English decisions; because the laws of the two countries regard the right to specific performance from different standpoints. In England the only legal right arising from a breach of contract is a claim for damages; specific performance is not matter of legal right, but a purely equitable remedy, which the Court can withhold when there are sufficient reasons of conscience or expediency against it. But in Scotland the breach of a contract for the sale of a specific subject such as landed estate gives the party aggrieved the legal right to sue for implement, and although he may elect to do so, he cannot be compelled to resort to the alternative of an action of damages unless implement is shewn to be impossible, in which case *loco facti subit damnum et*

*interesse*. Even where implement is possible, I do not doubt that the Court of Session has inherent power to refuse the legal remedy upon equitable grounds, although I know of no instance in which it has done so. It is quite conceivable that circumstances might occur which would make it inconvenient and unjust to enforce specific performance of contract of sale, but I do not think that any such case is presented in this appeal. The fact that the construction of a term in the contract is attended with doubt and difficulty, evidenced it may be by the different meanings attributed to it by Courts or individual Judges, ought not in my opinion to prevent its receiving its full legal effect, according to the interpretation finally put upon it by a competent tribunal. The argument that in this case a decree for specific performance would necessarily impose upon the appellant the duty of performing a long series of personal acts under the supervision of the Court does not appear to me to have a solid basis in fact. The acts which such a decree enjoins would be entirely within his power, and practically might be performed *uno flatu*, viz., by his signing a conveyance in favour of the respondent, and at the same time giving instructions to his agents to take the necessary steps for obtaining its approval by the Court.

Lord Herschell held:<sup>6</sup>

Specific performance was not a remedy to which a party was entitled at common law in England. To obtain it he was compelled to resort to the separate jurisdiction of the Court of Chancery, which at times refused its assistance, even where a legal right was established, leaving the party who invoked it to his ordinary legal remedies. In Scotland, on the contrary, specific implement is one of the ordinary remedies to which a party to a contract is entitled where the other party to it refuses to implement the obligation he has undertaken. And no authority has been cited to shew that such considerations as it is suggested would induce the Court of Chancery to refuse specific performance have ever been regarded as material where the ordinary remedy of specific implement is sought in an action in the Scotch Courts. I do not of course mean to say that it would not be open to maintain there that in the circumstances of a particular case it would be inequitable to enforce that remedy, but a party to a contract certainly does not establish that proposition by shewing that he imagined its legal effect and operation to be other than they are.

And Lord Macnaghten held:<sup>7</sup>

In England the remedy of specific performance is an extraordinary remedy. It is always a matter of discretion, and defences are admitted in a suit for specific performance which are inadmissible according to the doctrines and practice of the Courts of Scotland, where specific performance is part of the ordinary jurisdiction of the Court.

(Lord Macnaghten had observed, though, that the decision in *Stewart* would have been



similar in English equity.<sup>7)</sup>

*Stewart* was not the first case in which a court deciding an action for specific implement declared that it enjoyed a discretion whether to grant or refuse the ordinary legal remedy to which the pursuer was in general entitled. In *Moore v. Paterson* (1881)<sup>8</sup> Lord President Inglis<sup>9</sup> and Lord Shand<sup>10</sup> expressly decided the existence of the discretion in Scotland. No reference was made to English or any other country's law: Lord Watson thus correctly stated that this power derived from the court's inherent jurisdiction to administer justice: since Stair had affirmed the undivided jurisdiction of the Court of Session,<sup>11</sup> a necessary consequence thereof would be the judicial power of exercising a judicial discretion. The court's discretion to refuse interdict in a matter of public law not relating to contract was further decided by Lord Watson in *Grahame v. Magistrates of Kirkcaldy* (1882);<sup>12</sup> and though the distinctions might be drawn that interdict is not specific implement, and *Grahame* did not involve contract, reference to the First Division's judgments in the recent case of *Salaried Staff London Loan Co. Ltd. v. Swears and Wells Ltd.* (1985)<sup>13</sup> shows that *Grahame* is considered together with *Stewart* in a complementary approach to the enforcement of contractual obligations. In *Grahame* Lord Watson, as Lord Reid observed in *White & Carter (Councils) Ltd. v. McGregor*,<sup>14</sup> held that a legal remedy would only be refused for "some very cogent reason", thus clearly indicating that its enforcement is more than the pursuer's praying the court's indulgence for the grant of the relief. From this can be deduced the incidence of the *onus* of proof: in England the plaintiff seeking the exceptional remedy of specific performance has to show reasons why it should be granted; in Scotland<sup>15</sup> the pursuer proves the contract, claims the remedy, and leaves the defender to prove a good defence. In England the plaintiff is asked "Why?"; in Scotland, the defender is asked, "If not, why not?"

In *Grosvenor Developments (Scotland) plc v. Argyll Stores Ltd.* (1987),<sup>16</sup> an action for interdict, Lord Kincaid introduced qualifications to the nature of the pursuer's right to specific implement:

As Professor Gloag points out in his book on *Contract* at p. 655, it is only a general rule that an obligation to do something will be enforced by specific implement and it is not a remedy which a party has a right to obtain. There are exceptions to the general rule. There are many instances in the authorities where specific implement has not been granted (see Gloag on *Contract*, pp. 657-660). Moreover, it is not a remedy which a party has an absolute right to obtain. While the court has power to grant a decree of specific implement it is not bound to do so. The courts have a discretion to withhold the remedy (Lord Watson in *Grahame*...).

Gloag had put the matter more forcefully at page 655:

... The law of Scotland recognises, as a general rule, that a party who has contracted for a particular object is entitled to the assistance of the Court to secure that object; by a decree *ad factum praestandum* if the obligation he has secured is an obligation to do something; by a decree of interdict if the obligation is of a negative character. It goes further in these respects than the law of England.

Then follows Lord Watson's contrast of specific performance and specific implement which contains the words that breach gives the pursuer "the legal right to sue for implement", subject to the defence of impossibility.<sup>17</sup> Entitlement to the court's assistance in securing the contractual object is a circumlocution for "has a right to the appropriate remedy." If the objection were to be raised that a right to sue for a remedy is distinguishable from a right to obtain it, and that in Lord Watson's judgment the pursuer had the former but not the latter right, then Lord Herschell's words should be consulted: "In Scotland ... specific implement is one of the ordinary remedies to which a party to a contract is entitled...."<sup>18</sup> The relevant meaning of "entitled" is defined in the *Oxford English Dictionary*: "II From TITLE = 'right to possession'. 4. To furnish (a person) with a 'title' to an estate. Hence *gen.* to give (a person or thing) a rightful claim to a possession, privilege, designation, mode of treatment, etc."<sup>19</sup> Lord Herschell's sentence was part of the *ratio decidendi* of a House of Lords decision which outranks Lord Kincaid's *obiter dictum* in *Grosvenor Developments plc*. The existence of certain exceptions to the pursuer's right to the remedy does not imply that his interest ceases to be a legal right and becomes a matter of equitable indulgence. The problem, it is submitted, arose from the use of the word "absolute." MacKintosh in his book, *The Roman Law of Sale*, had cited *Stewart* as authority that the pursuer enjoyed an absolute right; by contrast, in England specific performance had long been a privilege occasionally granted by the equity courts, and was still discretionary.<sup>20</sup> "Absolute" was too strong a description: the pursuer's right is contractual, personal, and therefore subject to eventualities such as the defender's insolvency (though the proprietary aspects of the Sale of Goods Act 1979 create a jurisprudentially awkward exception<sup>21</sup>). Even in the field of real rights, the highest of them all-- ownership-- is now so circumscribed by legislative restrictions as no longer to be absolute. The adjective verges on the meaningless.

Comparison with South African law helps to confirm that in both systems the claimant's interest is a legal right qualified by the court's equitable discretion. In

*Farmers' Co-operative Society v. Berry* (1912) Innes C.J. held:<sup>22</sup>

*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE, C.J., in *Thompson v. Pullinger* (1 O.R., at p. 301), "the right of plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt." It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance should be made.

And in what since 1986 has been the leading case, *Benson v. S.A. Mutual Life Assurance Society*, Hefer J.A. held:<sup>23</sup>

That a right to specific performance exists was decided as long ago as 1882 (in *Cohen v Shires, McHattie and King*<sup>24</sup> ...) and subsequently reaffirmed in a host of cases (see eg *Thompson v Pullinger* (1894) 1 OR 298 at 301; *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343 at 350; *Woods v Walters* 1921 AD 303 at 309; *Shill v Milner* 1937 AD 101 at 109; *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 392 (A) at 433, to mention only a few), subject only to the qualification that the Court has a discretion to grant or to refuse an order for performance. This right is the cornerstone of our law relating to specific performance.

In both systems the organizing power of this general rule in favour of the remedy saves the courts' having to search relentlessly for cases justifying the award in similar circumstances: it can safely be granted unless the particular case presents a good reason for withholding it. In his chapter on specific implement, Gloag stated many of the instances in which the remedy would be granted;<sup>25</sup> little benefit would derive from rehearsing them here. We go on to the list of exceptions which he made<sup>26</sup> and which was adopted by Lord Patrick when *White & Carter (Councils) Ltd.* was before the Second Division:<sup>27</sup>

... An action for specific performance may fail (1) from the nature of the obligation it is proposed to enforce; (2) from the impossibility of performance; (3) from the impossibility of enforcing the decree; (4) from the fact that in the circumstances the enforcement of such a decree would involve exceptional hardship.

To this list Lord Patrick added a fifth ground taken from the first sentence of Gloag's

next paragraph illustrating (1):

or (5) from the fact that the enforced performance of an obligation would be an undue restraint on personal liberty.

Earlier, in a section perhaps classifiable under (1), Gloag<sup>28</sup> had exempted obligations to pay money.<sup>29</sup> But an obligation to consign money into court,<sup>30</sup> and an obligation to take up and pay for company debentures<sup>31</sup> are both specifically enforceable.

Hesitantly, Gloag had suggested that the remedy would be refused in a claim for delivery of sold goods lacking *pretium affectionis*.<sup>32</sup> This idea is examined in the main part of my thesis below.<sup>32</sup>

Another statutory exception to the general availability of specific implement is imposed by section 21(1)(b) of the Crown Proceedings Act 1947:<sup>34</sup> where

in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties.

Section 43, "Interpretation for purposes of application to Scotland," does not translate "specific performance" into "specific implement." A strict interpretation might distinguish specific implement from specific performance, and section 21(1)(b) as applicable to England, Wales, and Northern Ireland but not to Scotland; this argument would probably not convince a Scots court.

Grounds (1) and (5). Gloag's examples began:<sup>35</sup>

So contracts to enter into partnership;<sup>36</sup> to accept and pay for board and lodging;<sup>37</sup> to perform services involving technical, artistic, or literary skill,<sup>38</sup> cannot be specifically enforced. A person appointed to act as law agent, though for a definite period; cannot insist on his services being received.<sup>39</sup> Parties who are holding a horticultural show cannot be compelled to receive the exhibits of a competitor.<sup>40</sup>

The law of employment merits reconsideration of Scots law in the light of changed economic circumstances and comparative reference to South African law.<sup>41</sup>

**Ground (2).** Impossibility of performance is a standard defence, acknowledged by the Scots old authorities.<sup>42</sup>

**Ground (3).** Impossibility of enforcing a decree of specific implement raises the problem of the defender furth of Scotland, and the corporate defender. The absent defender is treated in connexion with *Union Electric Co. v. Holman*<sup>43</sup> in the part of the thesis on the sale of goods.<sup>44</sup> The corporate defender is dealt with in chapter five<sup>45</sup>.

**Ground (4).** This exception follows from the nature of the court's discretion to refuse the remedy for some very cogent reason.<sup>46</sup>

### **The South African exceptions in *Haynes v. Kingwilliamstown Municipality***

**1951 (2) SA 371 (A)**

Until *Benson* was decided, the leading South African judgment on the right to specific performance and on the court's discretion was De Villiers A.J.A.'s in *Haynes*:<sup>47</sup>

It is correct ... that in our law a plaintiff has the right of election whether to hold a defendant to his contract and claim performance by him of precisely what he had bound himself to do, or to claim damages for the breach. (*Cohen v. Shires, McHattie and King*, 1882 Kotzé's Reports, p. 41.) This right of choice a defendant does not enjoy; he cannot claim to be allowed to pay damages instead of having an order for specific performance entered against him. (*Farmers' Co-operative Society v. Berry*, 1912 A.D. 343 at p. 350.)

It is, however, equally settled law with us that although the Court will as far as possible give effect to a plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod interest*. The discretion which a Court enjoys although it must be exercised judicially is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.

As examples of the grounds on which the Courts have exercised their discretion in refusing to order specific performance, although performance was not impossible, may be mentioned: (a) where damages would adequately compensate the plaintiff; (b) where it would be difficult for the Court to enforce its decree; (d) where specific performance entails the rendering of services of a personal nature.

To these may be added examples given by Wessels on *Contract* (vol 2, sec. 3119) of good and sufficient grounds for refusing the decree, (e) where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances.

**Impossibility of performance.** This defence to specific performance is indicated by the

judge's words "so far as possible" and "although performance was not impossible." So, for example, a seller who contracts to sell someone else's property will be liable in damages but not for specific performance.<sup>48</sup> Further, an agreement was made to transfer land subject to the consent of the Minister of Agriculture to the subdivision. The consent was refused; so was specific performance, on the ground of impossibility of performance.<sup>49</sup>

If something has been successively sold to two different buyers, and transferred to the second, it belongs to the second and will not be taken away from him by the court unless the first buyer can prove the second's knowledge of the prior sale.<sup>50</sup> When the thing has not yet been transferred to either purchaser, application of the maxim *qui prior est tempore potior est iure* will usually entitle the first purchaser to the delivery of the thing, on the authorities cited by Hefer J.A. in *Krause v. Van Wyk en Andere*, a case complicated by pre-emptive rights.<sup>51</sup> The judge later qualified this proposition by saying, "In the decisions to which I have referred in this connexion, mention is nevertheless made of the fact that the rule must not be applied in an unfair way. I accept that this is so."<sup>52</sup> He therefore, in Lubbe's view,<sup>53</sup> left open the door to an equitable approach based on the principle of specific performance<sup>54</sup> and which would permit the court, in the exercise of its discretion, to exclude the maxim.

**Insolvency of the defendant.** The plaintiff's action for specific performance may be affected by whether the defendant's trustee or liquidator decides to continue or abandon the contract made before disaster strikes.<sup>55</sup> If the trustee decides to continue the contract, he must be ready and willing to perform the insolvent's obligations,<sup>56</sup> provided that this course of action is possible, practicable, and fair.<sup>57</sup>

If the defendant's trustee abandons the contract, as a general rule the plaintiff cannot claim specific performance and so obtain an unfair preference over the other creditors.<sup>58</sup> He is left with a damages claim entitling him to rank as a general creditor in the *concurso creditorum* for a dividend. So, for example, *Harris v. Trustee of Buissinne* (1840) established that at common law the buyer's claim for delivery of an immovable would fail on the seller's sequestration.<sup>59</sup> To this rule, statutory exceptions have since been introduced to protect the buyer who is willing to continue paying the whole price.<sup>60</sup>

**Ground (a).** As Kerr<sup>61</sup> and Joubert<sup>62</sup> remark, adequacy of damages on its own would undermine the defendant's right to choose specific performance rather than damages; so

is best combined with the support of another ground of refusal. Ground (c) was formerly thought to offer such support (though, as will be shown in the discussion of the sale of goods, the cases even before *Benson* did not actually bear out the opinion<sup>63</sup>); but ground (c) has now been swept aside by *Benson* as an independent ground, for the subject-matter was shares which Hefer J.A. assumed to have been freely available on the market, yet specific performance was granted.

Another ground with which (a) might be supported is (e), which has a sub-theme to the effect that "the cost to the defendant in being compelled to perform is out of all proportion to the corresponding benefit to the defendant and the latter can equally well be compensated by an award of damages...."<sup>64</sup> If the facts of *Heynes* are analysed in terms of the benefit of continued water supply to the plaintiff who already had alternative sources, and the corresponding cost to the municipality under a public duty to supply the Kingwilliamstown community with adequate water during a period of water restrictions in the midst of an unprecedented drought, then the combination of grounds (a) and (e) is valid, even after *Benson* revised the law of specific performance.

The court assesses the probable effects of the different types of order as at the time when judgment is to be delivered, not when the contract was made.<sup>65</sup> Uncertainty of damages assessment should incline the court to award specific performance, other things being equal.<sup>66</sup>

**Ground (b).** Difficulties of enforcement do not seem to have taken the form in South Africa that they have in Scotland: that a company defender may not be imprisoned.<sup>67</sup> Kerr<sup>68</sup> thinks that De Villiers A.J.A. may have been alluding to refusals of specific performance in building or repair disputes.

In what was regarded as the leading case in this field, *Barker v. Beckett & Co. Ltd.* (1911),<sup>69</sup> Esselen K.C. for the defendant had argued in the Transvaal Provincial Division that neither the tenant's obligation to insure the premises nor his obligation to repair them was specifically enforceable, because there was no agreement on the insurance sum or company, and no detail about which repairs must be made or for how much. Barry for the plaintiff landlord "admitted that the Court could not order specific performance to have the premises insured, or to put them in repair."<sup>70</sup> De Villiers J.P. later held<sup>71</sup> that Barry had

virtually admitted that it would be difficult for the Court, even if it were to give an order for specific performance, to enforce its order; and that of course is at the root of the doctrine of specific performance. In *Fry on Specific Performance* (3rd Ed. p. 44) I find the following laid down: "It is now clearly settled that, subject to certain exceptions, the Court will not specifically

enforce contracts to build or repair, both because specific performance is 'decreed only where the party wants the thing in specie, and cannot have it in any other way,' and because such contracts are for the most part so uncertain that the Court would be unable to enforce its own judgment." This applies not only to repairs, but, I take it, to insurance also, because, as has been pointed out the amount for which the buildings should be insured is not stated in the contract, and, if the Court merely ordered the defendant to insure the buildings, there would be no contempt of Court if they were insured for a wholly inadequate amount.

This ground has often been judicially endorsed.<sup>72</sup>

Invariable powerlessness, however, should not be inferred. Difficulties of supervision are sometimes forgotten, or intentionally surmounted. Kerr argues:<sup>73</sup>

In South Africa the Supreme Court has felt itself competent to enforce a contract to build a house,<sup>74</sup> to make an order to restore the water supply of a building,<sup>75</sup> and to order payment against the delivery and installation by the plaintiff in the defendant's premises of certain equipment;<sup>76</sup> and the Water Court has granted orders to build a bridge<sup>77</sup> and to erect fences<sup>77</sup> and to build a weir.<sup>78</sup> If courts can grant such orders so also they can grant orders to make repairs.<sup>79</sup>

In one of those cases, *Nisenbaum & Nisenbaum v. Express Buildings (Pty.) Ltd.*, which concerned the water supply, De Villiers J. did not order the repair of buildings because of uncertainty in the court papers,<sup>80</sup> yet he expressed the view<sup>81</sup> that

where a landlord acts in a high-handed manner, removes a portion of the leased premises or breaks it down to build somewhere else, however difficult it may be and however expensive, the Court might very well, in a case which would savour much more of spoliation than the present one, actually order the landlord to restore the buildings, and the Court would put a very high standard on such performance as a mark of disapproval of the high-handed action to the landlord.

Kerr cautions that since "damages as alternative to performance are not punitive (*Woods v. Walters*, 1921 AD 303 at 310 ...) the standard should not be put so high as to be punitive";<sup>82</sup> and suggests that specific performance will not usually be granted because the tenant has other remedies. This suggestion was made before *Benson*, in which the adequacy of another legal remedy, damages, was held not to bar the plaintiff from claiming specific performance: nowadays the defendant will probably have to show that the decree for specific performance of the building or repair obligation would cause



injustice.

Recently, the defence of the court's unwillingness to supervise a decree which may involve a number of acts by the defendant has been criticized in the English and related legal systems, and in South Africa. The Canadian, Sharpe,<sup>83</sup> surveys and answers the various concerns.

i) **Judicial dignity.** Courts may fear to grant orders which are impractical: disobedience to them may lessen public respect. But the courts do not supervise their decrees personally; the judgment creditor can apply to court for the committal of the debtor who is recalcitrant. Moreover, courts "have never refused to make damage awards because the judgment may not be collectable, and it may well be the case that a greater threat to the integrity of a judicial system is posed by the granting of an unenforceable damages award in that sanctions for non-compliance are much less severe."<sup>84</sup>

ii) **Regulation.** "In light of modern regulatory experience in an age of closely enforced building, safety and industrial standards, difficulty of enforcement is an unconvincing reason for refusing specific performance."<sup>85</sup> The worry is that the parties may relitigate, and enforcement will cost too much money and in public resources. (Expense was alluded to by De Villiers J. in *Nisenbaum*.) Cost is treated in the chapter on the economic theory of specific performance;<sup>86</sup> here Sharpe's comment may be noted: "Most litigation is much more complex now than it was years ago when these principles were first formulated. Lengthy trials are the rule and the burden a specific decree would impose on the court is now relatively much less significant than it was in the past."<sup>87</sup> To this a possible retort is that one should avoid making trials still more complex and protracted by requiring supervision of orders for the performance of a series of acts.

iii) **Justice.** It may be unfair to compel the maintenance of a long-term contract which one party is not happy to continue. The court should protect the defendant from oppression caused by hardship disproportionate to the plaintiff's actual loss of expectation. Yet the court should also protect the interest of the plaintiff, who has chosen to continue the contract and may know more than the court about the probability that the defendant might obey or disobey the order if it were granted.

iv) **Certainty.** This element has been decisive in South Africa; and Sharpe

acknowledges vagueness of the defendant's obligation as a good reason for refusal.<sup>88</sup> But the vagueness of some obligations to build, for example, should not bar the specific performance of all.<sup>89</sup>

in assessing the wisdom of ordering specific performance, the court will want to examine not only the nature of the obligation, but also the extent of its definition, and the extent to which it tells the defendant precisely what it is he must do, and hence allows for accurate judgment of the adequacy of his performance.

Two South African judges have lately questioned the soundness of this exception. *ISEP Structural Engineering and Plating (Pty.) Ltd. v. Inland Exploration Co. (Pty.) Ltd.* was a claim for the costs of reinstating premises at the end of a lease, the tenant having failed to do so.<sup>90</sup> Jansen J.A. assumed that the City Council could have claimed specific performance of the reinstatement obligation. Judicial reluctance to make such orders "was a limitation derived from the English practice, and not consonant with our law (cf De Wet and Van Wyk *Kontraktereg* 4th ed at 190-191";<sup>91</sup> though the order might be refused if the court, in the exercise of its discretion, should hold that the cost of reinstatement by the defendant just before the end of the lease would so far exceed the benefit to the plaintiff as to cause injustice.<sup>92</sup> Jansen J.A.<sup>93</sup> quoted Megarry V.-C. in *Tito v. Waddell No. 2* as indication of the English courts' revising their views on the difficulty of supervision:<sup>94</sup> the certainty of the obligation was now the important problem in a particular case. Jansen J.A.'s *obiter dictum* on this ground was welcomed by D.J. Joubert<sup>95</sup> and Luiz,<sup>96</sup> and referred to in passing by Galgut A.J.A. in *Cohen N.O. v. Verwoerdburg Town Council* (1983).<sup>97</sup> The following year Coetzee J. delivered a forthright judgment in *Ranch International Pipelines (Transvaal) (Pty.) Ltd. v. LMG Construction (City) (Pty.) Ltd.*<sup>98</sup> Counsel for Ranch referred to English, New Zealand, and Australian cases<sup>99</sup> in trying to persuade the judge that the employer was entitled unilaterally to break the building contract and refuse to cooperate with the builder who wanted to continue the work. Coetzee J.<sup>100</sup> admired the judicial technique with which Mahon J. in *Mayfield Holdings Ltd. v. Moana Reef*<sup>101</sup> had expounded the English law; but held that South African law was fundamentally different.<sup>102</sup> He proposed a narrow reading of Innes C.J.'s *obiter dictum* on mutuality in *Schierhout v. Minister of Justice*:<sup>103</sup> the doctrine being so foreign would surely not have been introduced indirectly by the Chief Justice.<sup>104</sup> Coetzee J. thus differed from Van Winsen J. in *Myers v. Abramson* (1952),<sup>105</sup> where the doctrine was applied and specific performance refused. Coetzee J. decided that Roman-Dutch law did not permit the employer unilaterally to stop the

builder from continuing the work.<sup>106</sup>

As regards the builder's right to specific performance so that the employer would be compelled to cooperate with him by allowing the continuation of the work, the judge held<sup>107</sup> that *Alfred MacAlpine & Son v. Transvaal Provincial Administration*<sup>108</sup> had confirmed the employer's duty to cooperate; unwillingness was a species of *mora creditoris*. As the duty was established, the builder's claim-- indirectly, for specific performance<sup>109</sup>-- fell to be considered. A.B. de Villiers's thesis, *Mora Creditoris as Vorm van Kontrakbreuk* (1953), was quoted:<sup>110</sup> in Roman-Dutch law the debtor's duty of cooperation could be specifically compelled; South African law was similar, as shown by cases such as *Gokal v. Moti and Another*.<sup>111</sup> There, I infer, the duty of cooperation resting on the buyer of the business had been to take delivery of the stock in trade, to accept cession of the lease and of the obligations under it, and to pay the price and provide security: the case is not particularly illustrative of the present issue. De Villiers had then quoted *Haynes* on the court's discretion to refuse the remedy. Coetzee J. adopted the statement and, following the judgment by the Full Bench of the Transvaal Provincial Division in *National Union of Textile Workers and Others v. Stag Packings (Pty.) Ltd. and Another*,<sup>112</sup> held:<sup>113</sup>

The law is clear. This is a remedy to which a party is entitled as of right. It cannot be withheld arbitrarily or capriciously. This is another of the important differences between our law and English law which starts off on the premise that a building contract is not specifically enforceable unless the three conditions mentioned by MAHON J ... are satisfied [: (1) That the nature of the building work is exactly defined so that performance if need be can be supervised. (2) That the interest of the plaintiff in having the contract performed is of such a nature that he cannot adequately be compensated for breach of the contract by damages. (3) That the defendant in terms of the contract has obtained the possession of the land on which the work is contracted to be done.<sup>114</sup>]

Coetzee J. also approved the result in *Industrial & Mercantile Corporation v. Anastassiou Brothers*, where Davidson J. had refused to be "supine and spineless in dealing with the offending contract breaker, by giving him the benefit of paying damages rather than being compelled to perform"<sup>115</sup> when he had arrogantly failed to do so, and would suffer inconvenience and probably some financial loss.

The traditional objection to granting specific performance of building contracts had been the court's difficulty of supervising the order. Coetzee J. wondered<sup>116</sup>

if this so-called difficulty is not grossly over-emphasised. Is it not imaginary rather than real? I could not find a case on record where such a difficulty actually arose in practice and which had to be dealt with by the Court after an order to perform a building contract had been made. Why should there be any difficulty? What is the need of supervision anyway? Does the Court ever supervise the execution of its judgments? Surely not. Orders *ad factum praestandum* are made all the time. There is no supervision thereof and no intervention by the Sheriff. If there is an intentional refusal to perform, contempt proceedings may follow. Why should different considerations then apply to building contracts? Accurate performance of them with the requisite skill or workmanship is irrelevant in this context. As it is the case of every other order *ad factum praestandum*. The judgment creditor will surely cancel the contract when it is unintentionally incorrectly performed. The judgment does not replace the contract. After all, this risk, as well as that of not succeeding in contempt proceedings, the owner took when he asked the Court for this order. It is his affair. If the owner has elected to claim this remedy and he is prepared to take these risks, why, one may ask, should it lie, as a matter of logic, in the mouth of the defaulting builder to advance any reason connected with the quality of his performance or his general unwillingness, as a basis for avoiding an order compelling him to perform his bargain?

Appropriate relief in *Ranch* took the form of an interim interdict prohibiting the employer from interfering with the builder's continuation of the work, and permitting the employer to show, on the return day of the rule *nisi*, good reasons for cancelling the contract.<sup>117</sup>

This ground now has to be considered from two different viewpoints: what the South African courts can do, and what they should do to enforce their orders. *National Butchery Co. v. African Merchants Ltd.* 1907 Eastern Districts Local Division 57; 93; and 138 illustrated the court's willingness to persevere in giving effect to an order for specific performance. As the headnote records the first stage of the dispute:<sup>118</sup>

The defendants undertook to erect a cold storage and ice-making plant capable of producing 700 lbs of ice in twelve hours, and of maintaining a cold room at a temperature of not more than 20°F. [The obligation was therefore certain.] The plant, when taken over by the plaintiff, was found not to fulfil these conditions, being capable only of doing the work required in twenty-four hours.

After the defendants had for more than a year unsuccessfully tried to rectify the plant, the court granted the plaintiff specific performance and damages in the alternative.

In the second stage, the defendants then informed the plaintiff that they would install a more powerful plant. The plaintiff refused them entry to the premises until they gave him specifications of the equipment and some idea of how long it would take to install.<sup>119</sup> The court held that he was reasonably entitled to both points of

information: the new plant was much bigger; and alternative arrangements for business would have to be made while the job was performed. Until the defendants furnished the information, they should be refused entry: and their application was refused.<sup>120</sup> Put into Coetzee J.'s language, the plaintiff's duty of cooperation was suspended until the defendants had discharged these aspects of theirs.

In the third and final stage, the defendants did supply specifications which the plaintiff complained were incomplete and unsuitable. He consulted an engineer and provided his own specifications. The defendants' engineer agreed with the plaintiff's about the inadequacy of the defendants' specifications. The defendants (respondents at this point) showed commendable flexibility:<sup>121</sup>

as regarded the pump and tower, they were prepared, should the existing ones be found inadequate upon trial, to provide new ones; they were willing to have the engine-bed inspected after removal of the present engine by a competent and independent engineer, who should decide whether the foundation could carry the larger engine; and with respect to the cubic capacity of the cool chamber, the original specifications provided for a room 16 ft. X 18 ft. X 10 ft., and of "approximately 3500 cubic feet" capacity, and they maintained they had fulfilled this provision by constructing a room of the linear measurements given.

Kotzé J.P. approved this arrangement, holding<sup>122</sup> that the

original contract required that the old room should be of the linear dimensions given, and not necessarily of 3500 cubic feet in capacity. But we agree with the applicant that in such a case as this it is necessary that the carrying out of work should be supervised by an expert and carried out in accordance with his specifications. The best course will be for the Court to appoint some impartial and reliable engineer, to whose satisfaction the Court will decree that the work shall be completed.

Kotzé J.P. then resolved a dispute over who should be that engineer.

Christie's objection to *National Butchery Co.* as an example of "how an order to perform construction work can run into trouble"<sup>123</sup> raises the query whether, although the courts can make such orders, they should do so. Coetzee J. might respond that the court should strive to uphold the plaintiff's right so far as equitable. When the court in *National Butchery Co.* first ordered specific performance; then forbade entry; and finally approved the arrangements and appointed the impartial engineer, it may not in the strict sense have been supervising the performance of the contract; but in three court appearances it was called upon, by one side or the other, to intervene in the

performance of the contract by ruling which course of conduct should be followed at each stage, and judicial resources were expended. With the benefit of hindsight, perhaps, we can suggest that the impartial engineer should have been judicially appointed at the end of the first stage, to oversee the giving of the specifications and the details of the time which the installation would take to perform. Scots law, in the courts' willingness to ordain specific implement of vassals' building obligations, offers South African lawyers a more relevant comparison than does the English law quoted in *Barker. Marshall v. Callander and Trossachs Hydropathic Co. Ltd.* shows that such a decree was ordained by the Lord Ordinary (Kyllachy) "to be duly proceeded with to the satisfaction of John Dick Peddie, architect, Edinburgh, and to be completed to his satisfaction within two years from the date hereof."<sup>124</sup> Peddie's task was later defined by Lord President Robertson as being to make sure that work continued and, after it was finished, to report whether it conformed to the decree; "and the most obvious prudence will make the defenders very ready to conform to his suggestions made in progress of the work."<sup>125</sup>

So much for expense and its reduction; fairness to the defendant, considered under De Villiers A.J.A.'s ground (e), may also require the court to consider whether to grant or refuse an order in a construction dispute. In *Ranch Coetzee J.* sympathized with the builder:<sup>126</sup>

It grates me to contemplate that in the course of executing a contract the employer, for his own personal reasons, should be able to chase the builder off the site merely because he prefers another. Even when it suits the innocent builder much better financially and otherwise to complete the job rather than claim damages.

But shortly beforehand, he had said:<sup>127</sup>

It is general experience that in the course of a large proportion of building contracts, there are frequent, sometimes very vehement, disagreements which often lead to a lot of bad blood. That is ... why these documents usually contain elaborate machinery for mediation and arbitration with which to solve these problems.

In *National Butchery* Kotzé J.P. remarked that the defendants had "elected to carry out the contract"<sup>128</sup> rather than to pay the alternative damages. Now, if the construction or repair contract contains no arbitration clause, and the plaintiff claims specific performance without damages in the alternative, it is submitted that considerations of

hardship to the defendant if specific performance were ordered should weigh heavily with the court.

**Benson v. S.A. Mutual Life Assurance Society 1986 (1) S.A. 776 (A)**

That part of *Benson* which deals with De Villiers A.J.A.'s ground (c) and the availability of the shares on the market is discussed in the context of the sale of goods.<sup>129</sup> Here we consider the Appellate Division's views on the judicial discretion to refuse the remedy. Hefer J.A. made a preliminary observation<sup>130</sup> about the

general approach in an appeal in which the Court of appeal is asked to interfere with the grant of a decree of specific performance. It is settled law that the grant or refusal of such an order is entirely a matter for the discretion of the Court in which the claim is made. (*Haynes* ... 1951 (2) SA 371 (A) at 378; *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 at 440-1.) It is an equally well-settled principle that the power to interfere on appeal in matters of discretion is strictly circumscribed. In *Ex parte Neethling and Others* 1951 (4) SA 331 (A) at 335 GREENBERG JA indicated that the question in such a case is whether:

"the Court *a quo* has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons".

(See too *R v Zackey* 1945 AD 505 at 510, 511; *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398; *Commissioner for Inland Revenue v Da Costa* 1985 (3) SA 768 (A) at 775.) That, in my view, is the approach which is to be adopted in the present case.

Hefer J.A. later quoted<sup>131</sup> De Villiers A.J.A.'s two paragraphs<sup>132</sup> on the plaintiff's right to specific performance on the court's discretion which is not "circumscribed by rigid rules." Hefer J.A. wished to elucidate the statement on "rigid rules":<sup>133</sup>

The use of the word "rigid" may be taken to imply that there are indeed rules regulating the exercise of the discretion but that they are not inflexible; that is in effect what Story *Equity Jurisprudence* says in the passage which [De Villiers A.J.A.] cited with approval at 379 of the report. I doubt, however, whether that is what was intended, particularly after it was accepted that a plaintiff has the right to elect whether to demand performance or to sue for damages, and that the Courts will as far as possible give effect to his election.

The judge, in a passage already quoted,<sup>134</sup> traced the provenance of the law on the plaintiff's right to specific performance and confirmed the right as fundamental. He went on:<sup>135</sup>

Once that is realised, it seems clear, both logically and as a matter of principle, that any curtailment of the Court's discretion inevitably entails an erosion of the plaintiff's right to performance and that there can be no rule, whether it be flexible or inflexible, as to the way in which the discretion is to be exercised, which does not affect the plaintiff's right in some way or another. The degree to which it is affected depends, of course, on the nature and extent of the rule; theoretically, I suppose, there may be a rule which regulates the exercise of the discretion without actually curtailing it but, apart from the rule that the discretion is to be exercised judicially upon a consideration of all relevant facts, it is difficult to conceive of one. Practically speaking it follows that, apart from the rule just referred to, no rules can be prescribed to regulate the exercise of the Court's discretion.

This does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, nor upon a wrong principle (*Ex parte Neethling* (*supra* at 335)). It is aimed at preventing an injustice-- for cases do arise where justice demands that a plaintiff be denied his right to specific performance-- and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy (cf De Wet and Yeats *Kontraktereg en Handelsreg* 4th ed at 189). Furthermore, the Court will not decree specific performance where performance has become impossible. Here a distinction must be drawn between the case where impossibility extinguishes the obligation and the case where performance is impossible but the debtor is still contractually bound. It is only the latter type of case that is relevant in the present context, for in the former the creditor clearly has no legal remedy at all. (See *De Wet and Yeats* (*op cit* at 189 n 61 and the cases there cited); and see too in this connection *Tamarillo ...* (*supra* at 441-3).

The words in the first paragraph of this extract "any curtailment of the Court's discretion" are puzzling: "enlargement" would, it is submitted, express the gist of the passage, for the plaintiff's right to the remedy is general, and therefore is restricted by the exercise of the court's discretion to refuse the remedy-- as Hefer J.A. later declared. Further, that no rules are to fetter the discretion is too broad a statement: impossibility of performance is a complete defence, by a rule which therefore outranks that entitling the plaintiff to specific performance. This rule is rigid and curtails the court's discretion.

Apart from impossibility of performance and the defendant's insolvency, the idea that the court's discretion should not be regulated by prescriptions innovates on De Villiers A.J.A.'s statement that the discretion is not confined by rigid rules: the other examples of grounds of refusal are transformed from rules (which, we infer, all too easily rigidify) into principles (which stay flexible). The basic principle about refusal because of unfairness restates De Villiers A.J.A.'s ground (e): as this was taken from



Wessels, who had taken it from J.D. Lawson's book, *The Principles of the American Law of Contracts at Law and in Equity*,<sup>136</sup> the Anglo-American influence on South African of specific performance continues to that extent. This is very much to be supported: McCall concluded that in Roman-Dutch law the court lacked a discretion to refuse specific performance;<sup>137</sup> and if South African judges felt themselves unable to draw on the court's inherent jurisdiction and create a power of discretion without reference to other legal systems, as Lord President Inglis and Lord Shand had done for Scots law in *Moore v. Paterson*,<sup>138</sup> then all the better that South African law was improved in fairness and flexibility by the adoption of Anglo-American law. Even those severe critics of rules derived from the English law of specific performance, De Wet and Yeats, whose opinions have strongly influenced the latest restatements of the South African remedy, acknowledge the need to restrict the availability of specific performance and to concede the courts a discretion to refuse it on good grounds, particularly in the general interest.<sup>139</sup> The basic principle of unfairness, Beck points out, "would adequately explain most of the cases" in which the remedy had been refused.<sup>140</sup> The self-sufficiency of De Villiers A.J.A.'s ground (c) was strongly rejected in *Benson*.<sup>141</sup> Perhaps grounds (a), (b), and (d) are to be brought under the basic principle of unfairness; though it would have been helpful, in a judgment obviously intended as a text-book restatement of the remedy, if the independent weight of these grounds had also been declared.

The proposition about legal and public policy was abstract. It is an ideal source from which the superior courts may develop appropriate responses to changing conditions; but because such policy is in practice what the courts say it is, the potential for some uncertainty has been introduced into the current law. Magistrates in the lower courts may be disconcerted by practitioners' arguments about policy. For example, though *Benson* rejected the independent defence of the availability of market substitutes, the idea behind it can be recast as a combination of a policy to prevent unreasonable hardship to the seller (the basic principle of unfairness, which is inferred to be judicial policy) and of a policy (perhaps public) deprecating the waste of judicial resources when the defendant could have bought available market substitutes and claimed whatever damages he had suffered. With suitable changes, similar arguments could be advanced in construction disputes. And if such have convinced the trial court, how far would the appeal court be entitled to interfere? The grant or refusal would be entirely for the discretion of the trial court,<sup>142</sup> which would have applied the basic principle of unfairness and a reason derived from a policy supposed to be public. Practitioners may

feel unsure about the prospects of successful institution or defence of an action for specific performance, until *Benson* has accumulated its own examples of what is meant by legal and public policy.

An example of the uncertainty in the current law relates to that important aspect of procedure, the *onus* of proof. In *Thompson* Kotzé J.P. deduced that as the plaintiff had a legal right to specific performance, the defendant bore the *onus* of proving why the shares should not be delivered; "and where there is a doubt, the plaintiff is entitled to delivery of the shares bought by him."<sup>143</sup> Again, in *Shill v. Milner De Villiers* J.A. decided that "Shill nowhere deposes that it was impossible to [transfer export quota certificates], and if that was his defence he should have raised it in his plea and the *onus* would lie on him to prove impossibility."<sup>144</sup> This ruling outranked Broome J.P.'s in *Gorfil v. Maxwell and Others* that "there was much to be said for" holding that as damages sufficed, the plaintiff had to prove his right to the remedy.<sup>145</sup> That justification would no longer hold water after *Benson*: *Shill* must surely be correct.

This conclusion is weakened, however, by judicial obscurity at the highest level. In *Van Rooyen v. Baumer Investment (Pty.) Ltd.*,<sup>146</sup> Ettlinger A.J. held that in the submission of the applicant's counsel

*prima facie* a creditor is always entitled to an order for specific performance and the *onus* is on the debtor to show that he cannot perform. This may be so, and there certainly are authorities which support the view that a creditor is entitled to an order for specific performance unless the debtor shows that he cannot perform. But in my view that is not so where the ability of the debtor to perform is raised and left in doubt. It is to be borne in mind that if an order for specific performance is made and not complied with the applicant's only remedy is by way of contempt of court, and the Court is always disinclined to make an order which would result in contempt proceedings at the hearing of which it may well appear that the defendant or respondent cannot carry out his obligations.

This reasoning was not invariably sound: the judgment debtor need not be imprisoned for contempt if, for example, the act can be performed by the court's officer or the Master.<sup>147</sup> Yet the acting judge's restriction was applied by Watermeyer A.J. in *Maisel v. Camberleigh Court (Pty.) Ltd.*<sup>148</sup> and by Kannemeyer J. in *Douglas G. Wylde & Co. v. Burger*.<sup>149</sup>

*Van Rooyen* considerably qualifies *Shill*. As regards the defendant to an action for specific performance, Kannemeyer J.'s words "an *onus* ... to allege"<sup>150</sup> mean no more than an evidentiary burden: a "duty to adduce evidence to combat a *prima facie* case made out by his opponent (or *weerleggingslas*)."<sup>151</sup> By process of inference, the

plaintiff claiming specific performance would have to discharge the other, heavier kind of burden: the *onus* of proof, also called the "primary onus, overall onus, the onus in its true and original sense, the risk of non-persuasion, the persuasive burden, the legal burden...."<sup>151</sup> Yet *Shill* had put the *onus* on the defendant: the *onus* of proof, we infer, not just the evidentiary burden. So long as the *Van Rooyen* opinion remained confined to judges in the provincial divisions, *Shill* would outrank it.

Now, though, *Van Rooyen* has penetrated to the Appellate Division. In *Tamarillo Miller J.A.* held:<sup>148</sup>

The *dictum* of DE VILLIERS JA in *Shill v Milner* is composed of two elements; (i) that it is for the defendant to raise impossibility as a defence and that he must raise it in his plea (or in his answering affidavit) and (ii) that the *onus* then rests on him to prove impossibility. While I appreciate that the Court might in certain respects, when considering how to exercise its discretion in regard to a claim for specific performance, approach differently (i) in a case in which effective performance is possible only with the consent of a third party and (ii) the more usual type of case in which the consent of another is not necessary for effective performance, I am unable to discern why there should be a difference in approach in respect of the first element of the *dictum* in *Shill*.... Ordinarily it is the defendant who is called upon to perform who has peculiar knowledge concerning his ability or inability to do what is required of him. This is generally as true of a defendant who is required to deliver a particular article as of one who is required to perform an act which requires, for effectiveness, the consent of another. In the latter case the defendant, having undertaken to perform that act, may in the absence of evidence to the contrary not unreasonably be taken to have made the arrangements necessary to enable him to perform it, just as the defendant who has undertaken to deliver an article may reasonably be taken to have arranged for the article to be available for delivery. It is generally not for the plaintiff to anticipate in his declaration the possible defences a defendant might raise. And still less is it incumbent on a plaintiff who claims specific performance, the grant or refusal of which is in the final result in the discretion of the Court, to anticipate in his declaration the possible grounds which a defendant may advance to induce the Court to exercise its discretion against the grant of specific performance. To the extent that the judgment in *Jacobsz v Fall* ... necessarily requires a plaintiff who claims specific performance of an undertaking to assign rights and obligations (eg to assign a lease) to allege in his declaration or particulars of claim, and to prove, that what he claims can effectively be performed by the defendant, I disagree with it.

Concerning the *onus* of proof, the second element of the *dictum* of DE VILLIERS JA, it may be that in certain cases evidence falling short of proof of impossibility might nevertheless justify a Court in refusing to decree specific performance. In *Van Rooyen* ... ETTLINGER AJ at 120-1, after referring to *Shill* ..., expressed the view that "where the ability of the debtor to perform is raised (by the debtor) and left in doubt", specific performance should be refused. In a case in which the defendant requires the consent of a third party to enable him to perform effectively, and at the end of the case,

the defence of impossibility having been raised and canvassed, the probabilities in regard to that issue appear to be evenly balanced, the Court, it appears to me, might justifiably take the view that refusal of specific performance was preferable to the grant of an order which as likely as not would prove to be ineffectual. A rule that a defendant pleading impossibility as answer to a claim for specific performance must necessarily discharge the *onus* of proving it if he is to avoid such a decree might hamper and inhibit the Court in the exercise of its discretion. As the extract quoted earlier herein from the judgment of this Court in *Haynes v Kingwilliamstown Municipality* shows, the Court's discretion is not "circumscribed by rigid rules". The second element of the dictum in *Shill* ... might well have been too generally and positively stated.

Miller J.A. contradicted himself. On the one hand, he disagreed with the requirement in *Jacobsz*<sup>153</sup> that a plaintiff must "prove ... that what he claims can effectively be performed by the defendant...."<sup>154</sup> On the other hand, he held that the court could in the end take the view, where the probabilities were evenly balanced, that specific performance should be refused; the second element of the *Shill dictum* was too general. Yet if the defendant merely raises the defence of impossibility, thus discharging his evidentiary burden, then the plaintiff, if he wishes to succeed in obtaining specific performance from a judge applying *Tamarillo*, must "prove ... that what he claims can effectively be performed by the defendant." If the reply were to be made that Miller J.A. confined himself to saying that the plaintiff did not have to allege and prove at the outset of the case that the defendant could perform; and did not hold that the plaintiff might not have to prove this later in the proceedings, after the defendant had discharged the evidentiary burden of adducing evidence to suggest impossibility of performance, two different views of the law would be revealed.

The first view is that there is only one *onus* of proof in an action for specific performance. It rests throughout on the plaintiff claiming the remedy; and, being the *onus* of proof, can never shift to the defendant.<sup>155</sup> This *onus* of proof further requires the plaintiff to discharge the initial evidentiary burden of adducing evidence that the contract exists; on this he bases his *prima facie* right<sup>156</sup> to specific performance. The evidentiary burden-- not the *onus* of proof-- then shifts to the defendant, who must adduce evidence suggesting that the remedy should be refused because of impossibility of performance or, perhaps (since Beck<sup>153</sup> observes that there is no logical distinction between impossibility of performance and any of the other defences which may be grouped under the head of unfairness), because of unfairness. Miller J.A.'s opinion in *Tamarillo* implies that once the defendant has discharged this evidentiary burden of adducing such contrary evidence, then the evidentiary burden shifts back to the plaintiff,

who risks failure unless he can discharge the *onus* of proof-- not merely the evidentiary burden-- that, despite the defendant's evidence and arguments, the order for specific performance would be possible, effectual, and fair.

The second view, by contrast, is that there is more than one issue in a claim for specific performance, and so there is more than one *onus* of proof.<sup>158</sup> This idea is opened up by the words which I have emphasized in Miller J.A.'s opinion: "... the defence of impossibility having been raised and canvassed, the probabilities in regard to that issue...."<sup>159</sup> One *onus* of proof rests on the plaintiff: so at the start of the case he bears the evidentiary burden of adducing evidence that the contract exists; on that he bases his claim for specific performance. After that evidence is taken, a second different *onus* of proof arises: it rests on the defendant, who admits the existence of the contract shown by the plaintiff's evidence; but confesses and avoids-- a separate issue-- in the sense that the defendant then bears an evidentiary burden of adducing evidence to show that performance would be impossible, ineffectual, or unfair. If that evidence is inadequate, the defendant has not discharged his *onus* of proving why the shares should not be delivered (*Thompson v. Pullinger*); why the export quota certificates should not be transferred (*Shill v. Milner*); or, in general, why performance should not be made. If he cannot discharge his *onus* of proof, then the plaintiff's *prima facie* right to specific performance implies that his own evidence of the contract and its implicit susceptibility to specific performance has not convincingly been impugned by the defendant, so that the remedy should be ordered as claimed.

The first view of the plaintiff's *onus* of proof fits Miller J.A.'s statement in *Tamarillo*; the second, Kotzé C.J.'s and De Villiers J.A.'s statements in *Thompson* and *Shill* respectively. The first view implies that the plaintiff's claim to the remedy is not much of a right. It merely obliges the defendant to lead some evidence, even if unconvincing, to suggest reasons for refusing the remedy; the defendant then hopes that the court will rescue him, though his excuse for non-performance may be flimsy and left hanging in the air when, in these days of postal services, telephones, paging devices and services, and fax machines, one would think that a third party on whose consent the defendant's ability to perform the court's decree might depend could be asked directly, yea or nay, so that the fact of impossibility could be proved or disproved once and for all.<sup>160</sup> But even supposing that the third party has disappeared into the Amazon forests and is out of touch with normal means of modern communication such as radio, we could still suggest that the court might overcome the difficulty with an appropriately-worded order: specific performance is ordered; but if it should happen that the third

party on whose consent the plaintiff's performance depends, subsequently refuses that consent, so that the defendant cannot perform the court's order, then the defendant will be liable for damages in lieu of specific performance. If this suggestion is rejected by the court, what is to stop the defendant from raising other excuses for possible inability to perform the court's order if it were made: for example, the excuse that tomorrow he might be run over by a bus, or suffer a heart attack and die? Until the risk of impossibility of performance actually materializes, should not the plaintiff with the *prima facie* right to specific performance, rather than the defendant with the unproven excuse, be given the benefit of the doubt?

The second view accords with the law that the South African plaintiff is not merely seeking the court's indulgence but is claiming the court's assistance in the enforcement of a right.<sup>161</sup> His entitlement should only be defeated by clear, contrary evidence, not phantom possibilities.

Even after *Tamarillo* it was possible to argue that whereas the statements in *Thompson* and *Shill* were part of the *rationes decidendi*, Miller J.A.'s statement in *Tamarillo* was an *obiter dictum* and was therefore outranked by *Shill* on rules of precedent: the judge had immediately held:<sup>162</sup>

It is not necessary for present purposes, however, to pursue that question further. *Tamarillo* did not raise the defence of impossibility of performance and there was accordingly no canvass of that issue. Whether or not it was necessary for *Tamarillo* to discharge the *onus* in order to avoid a decree of specific performance, it certainly bore the burden of alleging impossibility and adducing evidence in support thereof-- evidence of the facts or circumstances upon which it asked the Court to exercise its discretion against the grant of the order prayed. Had impossibility been raised in the answering affidavit Aitken would no doubt have dealt with it in reply.

*Tamarillo* therefore failed on the first leg of the *Shill* requirement; Miller J.A.'s pronouncements on the second leg were not necessary for the decision.

The position is further unsettled by *Benson*. Benson's counsel argued:<sup>163</sup>

Though the *onus* lies on appellant to prove that he did not receive the shares and that it was therefore impossible for him to perform (see *Shill* ... at 106), the Court's discretion should not be circumscribed by appellant's failure to discharge this *onus*. Cf *Tamarillo* ... at 443.

The Society's counsel argued that the right to the remedy<sup>164</sup>

is displaced only if facts are proved which establish that performance is no longer possible, or that the order would result in unjustifiable hardship if it were granted. ... The *onus* was on appellant to prove the facts requiring the Court to exercise its discretion in his favour. *Thompson* at 308; *Shill* ... at 106; ...; cf *Tamarillo* ... at 443F. At the very least, appellant had to plead and adduce evidence of impossibility or unjustifiable hardship. *Tamarillo's* case ... at 443G. There is certainly no *onus* on respondent to prove the performance is possible. *Tamarillo's* case ... at 441H-443A.

So the dispute over the incidence of the *onus* was neatly presented to the Appellate Division.

A great weakness of Hefer J.A.'s judgment is the failure to decide clearly between *Shill* and *Tamarillo*. The plaintiff's right was emphasized as the cornerstone of the relevant law; the court's discretion is not regulated except by the rule that it must be exercised judicially. As to impossibility,<sup>165</sup>

a distinction must be drawn between the case where impossibility extinguishes the obligation and the case where performance is impossible but the debtor is still contractually bound. It is only the latter type of case that is relevant in the present context, for in the former the creditor clearly has no legal remedy at all. (See *De Wet and Yeats* ... at 189 n 61 and the cases there cited); and see too in this connection *Tamarillo* ... at 441-3).

Pages 441 to 443 of Miller J.A.'s judgment in *Tamarillo* cover the whole of his discussion of impossibility: the references to *Jacobsz* and to the English case of *Wroth v. Tyler*;<sup>166</sup> *Shill* and the *Van Rooyen* line of cases; the two elements of De Villiers J.A.'s *dictum* in *Shill*; Miller J.A.'s self-contradiction; and the implicit acknowledgement that the opinions on the second leg of *Shill* were *obiter dictum*. Hefer J.A. seems to have added the citation as a supporting reference. If *Benson* and *Tamarillo* were to be defended by the argument that, as was held in *Pillay v. Krishna and Another*, "all rules dealing with the subject of the burden of proof rest 'for their ultimate basis upon broad and undefined reasons of experience and fairness'";<sup>167</sup> and a defence of impossibility or unfairness should allow the court free exercise of its discretion to refuse the plaintiff's right to specific performance even though the defendant has not convincingly proved good reasons why it should be refused, the answer may be returned that it would be unfair thus to withhold from the plaintiff the remedy which experience in the form of precedent since 1882 had led him to expect as his right. If *Tamarillo* were to displace *Thompson* and *Shill*, specific performance would in practice become more discretionary, more of an equitable indulgence by the court to the plaintiff, despite the general declarations to the contrary. A plaintiff who now hears Hefer J.A.'s ringing words that

his right is "the cornerstone of our law relating to specific performance";<sup>168</sup> but is then refused the remedy because the judge, applying *Tamarillo*, regards the probabilities as evenly balanced and doubts whether an order for the remedy would be effectual, even though the defendant has failed to discharge the *onus* of proving a defence, might conclude that, so far as the *onus* of proof is concerned, the present members of the Appellate Division found the cornerstone marble and have left it brick.

### Notes

1. Scots old authorities: *supra* chapter 1.
2. 1890, 17 R. (H.L.) 1.
3. 1889, 16 R. 421, 423-4 (1st Div.).
4. *Id.*, 435.
5. 1890, 17 R. (H.L.), 10-1. For discussion of Ld. Watson's views on the *actio quanti minoris*, see Appendix A.
6. *Id.*, 5.
7. *Id.*, 12.
8. 1881, 9 R. 337 (1st Div.).
9. *Id.*, 348.
10. *Id.*, 351.
11. STAIR, INST. 4.3.1.
12. 1882, 9 R. (H.L.) 91, as McKendrick, 1986 S.L.T. (News) 249, 250 remarked.
13. 1985 S.L.T. 326 (1st Div.).
14. 1962 S.C. (H.L.) 1, 14.
15. McKendrick, 1986 S.L.T. (News), 251.
16. 1987 S.L.T. 738 (Ex. Div.), 740 B-C *per* Ld. Kincaig.
17. *Supra* pages 66-7 and n. 5.
18. *Supra* page 67 and n. 6.
19. 3 O.E.D. 219.
20. J. MACKINTOSH, THE ROMAN LAW OF SALE 142 (2d ed., 1907).
21. *Infra* chapter 14.
22. 1912 A.D. 343, 350.
23. 1986 (1) S.A. 776 (A) 782 H-J.
24. (1882) 1 S.A.R. 41.
25. W.M. GLOAG, THE LAW OF CONTRACT "Contracts Specifically Enforceable" and "Leases" at pp. 656-7 (2d ed., 1929).
26. *Id.*, 657.
27. 1960 S.C. 276, 283 (2d Div.) (decision reversed on other grounds).



28. GLOAG, CONTRACT 655-6.
29. Section 4, Debtors (Scotland) Act 1880 (43 & 44 Vict. c. 34).
30. Mackenzie v. Balerno Paper Mill Co. 1883, 10 R. 1147 (1st Div., consulted judges).
31. Section 105, Companies (Consolidation) Act 1908 (8 Edw. VII c. 69). *See*, now, section 195, Companies Act 1985 (c. 6).
32. GLOAG, CONTRACT 657.
33. *Infra* Part III.
34. (10 & 11 Geo. 6 c. 44).
35. GLOAG, CONTRACT 657.
36. *Id.*, n. 4: McArthur v. Lawson, 1887, 4 R. 1134 (1st Div.).
37. *Id.*, n. 5: Kerrigan v. Hall, 1901, 4 F. 10 (1st Div.).
38. *Id.*, n. 6: Lumley v. Wagner, 1 De G. M. & G. 604 (1852); 42 E.R. 687.
39. *Id.*, n. 7: Cormack v. Keith & Murray, 1893, 20 R. 977, opinion of Ld. McLaren (1st Div.).
40. *Id.*, n. 8: Cocker v. Crombie, 1893, 20 R. 954 (2d Div.).
41. *Infra* chapter 4.
42. *Supra* chapter 1.
43. 1913 S.C. 954 (1st Div.).
44. *Infra* chapter 12. *See*, also, chapter 13.
45. *Infra* chapter 5.
46. GLOAG, CONTRACT 660-1.
47. 1951 (2) S.A., 378D-379A.
48. Rissik v. Pretoria Municipal Council 1907 T.S. 1024, 1037 *per* Wessels J.
49. Bekker N.O. v. Duvenhage 1977 (3) S.A. 884 (E).
50. Shakinovsky v. Lawson and Smulowitz 1907 T.S. 326; Wheeldon v. Moldenhauer 1910 E.D.L. 97, 99 (business at Gungulu transferred to another innocent buyer).
51. 1986 (1) S.A. 158 (A) 171G-J.
52. *Id.*, 173I-J.
53. G.F. Lubbe, ANNUAL SURVEY OF SOUTH AFRICAN LAW 1986 147.
54. Botes v. Botes 1964 (1) S.A. 623 (O); Campbell v. First Consolidated Holdings (Pty.) Ltd. 1977 (3) S.A. 924 (W). *See*, also, the authorities cited by R.H. CHRISTIE, THE LAW OF CONTRACT IN SOUTH AFRICA 508 (1981).
55. The effect of insolvency on contracts made beforehand is discussed in 11 JOUBERT, LAW OF SOUTH AFRICA para. 215-21 (1981), updated by THE LAW OF SOUTH AFRICA CUMULATIVE SUPPLEMENT 1988 page 612.
56. Cohen N.O. v. Verwoerdburg Town Council 1983 (1) S.A. 334 (A) 352A-C.
57. *See, e.g.*, the list of factors militating against the grant of specific performance of the township-owning company's obligations in *Cohen N.O.*, 1983 (1) S.A., 347E-G.
58. 11 JOUBERT, THE LAW OF SOUTH AFRICA 178. *See*, also, Consolidated Agencies v. Agjee 1948 (4) S.A. 179 (N) 189.
59. (1840) 2 Menz. 105. *See*, also, Lucas' Trustee v. Ismail and Amod 1905 T.S. 239, 248 *per* Innes C.J.; Leviton & Son v. De Klerk's Trustee 1914 C.P.D. 685; Hewlett

- v. Adie N.O. 1976 (1) S.A. 166 (R); Rampathy v. Krumm N.O. and Others 1978 (4) S.A. 935 (D).
60. Sections 21 and 22, Alienation of Land Act No. 68 of 1981. Other types of contracts are discussed by Joubert, *supra* note 55: sales of moveables if the buyer has gone insolvent without paying the full price; leases; service contracts; and hire-purchase agreements.
61. KERR, CONTRACT 398.
62. 5 JOUBERT, THE LAW OF SOUTH AFRICA 147.
63. *Infra* chapter 15.
64. Haynes, 1951 (2) S.A., 380B; KERR, CONTRACT 399; 5 JOUBERT, THE LAW OF SOUTH AFRICA 147 and n. 9.
65. Haynes, 1951 (2) S.A., 381A.
66. KERR, CONTRACT 399, citing Maw v. Grant 1966 (4) S.A. 83 (C) 88G.
67. *Infra* chapter 5.
68. KERR, CONTRACT 399.
69. 1911 T.P.D. 151.
70. *Id.*, 158.
71. *Id.*, 164-5.
72. Marais v. Cloete 1945 E.D.L. 238, 243; Deutschsuedwestafrikanische Wollzuechtere Gesellschaft m.b.H. v. Weiss 1942 S.W.A. 54, 58; Hunter v. Cumnor Investments (Pty.) Ltd. 1952 (1) S.A. 735 (C) 740D; Gijzen v. Verrinder 1965 (1) S.A. 806 (D) 812C. For criticism, see KERR, CONTRACT 399-401; W.E. COOPER, THE SOUTH AFRICAN LAW OF LANDLORD AND TENANT 81 (1973); DE WET & YEATS, KONTRAKTEREG 190 (1978).
73. KERR, CONTRACT 399-400.
74. *Id.*, n. 199: Mink v. Vryheid Coal and Iron Co. (1912) 33 N.L.R. 182.
75. *Id.*, n. 200: Nisenbaum & Nisenbaum v. Express Buildings (Pty.) Ltd. 1953 (1) S.A. 246 (W) 251.
76. *Id.*, n. 201, Industrial & Mercantile Corporation v. Anastassiou Brothers 1973 (2) S.A. 601 (W). "Note that the defaulting party raised the question of the competence of the court to make an order relating to installation: 605H. ff."
77. *Id.*, n. 202: De Beer v. Engelbrecht (1918) Krummeck's Reports 227.
78. *Id.*, 400 and n. 203: Joubert v. Espach 1935 T.P.D. 299.
79. *Id.*, 400 and n. 204: "Such an order would fall within the terms of D.19.1.6.1. and of Voet 19.2.14. and would possibly have been granted in *Alexander v. Armstrong*, 1879 Buch 233 at 238, if the lessee in that case had not undertaken to make repairs. *Alexander's* case was not followed in *Marais v. Cloete*, 1945 E.D.L. 238 at 242-3, as the Court preferred to follow *Barker's* case, 1911 T.P.D. 151. In view of the fact that the decision in *Barker's* case is subject to criticism as is shown herein and in *Nisenbaum's* case, 1953 (1) S.A. 246 (W) at 249-50, *Marais's* case need no longer be followed."
80. Nisenbaum, 1953 (1) S.A., 251.
81. *Id.*, 249-50.
82. KERR, CONTRACT 400 n. 209.
83. SHARPE, INJUNCTIONS AND SPECIFIC PERFORMANCE 290-5.

84. *Id.*, 291.
85. *Id.*, 291-2.
86. *Infra* chapter 17.
87. SHARPE, INJUNCTIONS AND SPECIFIC PERFORMANCE 293.
88. *Id.*, 294-5.
89. *Id.*, 295.
90. 1981 (4) S.A. 1 (A).
91. *Id.*, 5B.
92. *Id.*, 5F-H.
93. *Id.*, 5B-D.
94. [1977] Ch. 306, 321H-322B. These opinions, remarked SPRY, EQUITABLE REMEDIES 97 n. 3, "appear to represent an excessive reaction against unduly rigorous formulations of rules relating to supervisability of performance."
95. Joubert, 45 T.H.R.-H.R. 76, 79 (1982).
96. Luiz, 100 S.A.L.J. 26, 28-9 (1983).
97. 1983 (1) S.A. 334 (A) 347D-E.
98. 1984 (3) S.A. 861 (W).
99. *Id.*, 865-6..
100. *Id.*, 870F-G.
101. [1973] 1 N.Z.L.R. 309.
102. 1984 (3) S.A., 870G-H.
103. 1926 A.D. 99, 102.
104. 1984 (3) S.A., 871C-E.
105. 1952 (3) S.A. 121 (C). *See, infra* chapter 4.
106. 1984 (3) S.A., 873D-G.
107. *Id.*, 878D-I.
108. 1974 (3) S.A. 506 (A).
109. 1984 (3) S.A., 878I.
110. *Id.*, 879A-C.
111. 1941 A.D. 304.
112. 1982 (4) S.A. 151 (T).156.
113. 1984 (3) S.A., 879G-H.
114. *Mayfield Holdings*, [1973] 1 N.Z.L.R., 321 *per* Mahon J., referring to Romer L.J.'s judgment in *Wolverhampton Corporation v. Emmons* [1901] 1 K.B. 515, 525: *see Ranch* 1984 (3) S.A., 869A-C.
115. 1973 (2) S.A., 609A; 1984 (3) S.A., 880C-E.
116. 1984 (3) S.A., 880H-881B.
117. *Id.*, 881F-G.
118. 1914 E.D.L. 57.
119. *Id.*, 94.
120. *Id.*, 96.

121. *Id.*, 139-40.
122. *Id.*, 140.
123. CHRISTIE, CONTRACT 512.
124. 1897, 24 R. 712, 713 (1st Div.).
125. *Id.*, 717.
126. 1984 (3) S.A., 876E.
127. *Id.*, 876C-D.
128. 1914 E.D.L., 140.
129. *Infra* chapter 15.
130. 1986 (1) S.A. 776, 781G-782A.
131. *Id.*, 782C-F.
132. *Haynes*, 1951 (2) S.A., 378D-G.
133. 1986 (1) S.A., 782F-H.
134. *Supra* page 70 and note 23.
135. 1986 (1) S.A., 782I-783F.
136. J.D. LAWSON, THE PRINCIPLES OF THE AMERICAN LAW OF CONTRACTS AT LAW AND IN EQUITY s. 472 (p. 521) (1893).
137. *Supra* chapter 2.
138. *Supra* page 68 and notes 8-10.
139. DE WET & YEATS, KONTRAKTEREG 189.
140. Beck, 16 BUSINESSMAN'S LAW 105, 106 (1987).
141. 1986 (1) S.A., 783-4.
142. *Supra* page 82 and note 130.
143. (1894) 1 O.R. 298, 302.
144. 1937 A.D. 101, 106.
145. 1958 (2) P.H. F 74 (N), criticized by Turpin, ANNUAL SURVEY OF SOUTH AFRICAN LAW 1958 67-8; KERR, CONTRACT 404.
146. 1947 (1) S.A. 113 (W) 120-1.
147. *See infra* chapter 15.
148. 1953 (1) S.A. 371 (C) 377H-378A.
149. 1970 (3) S.A. 618 (E) 621C-D.
150. *Id.*, 622B.
151. L.H. HOFFMANN & D.T. ZEFFERT, THE SOUTH AFRICAN LAW OF EVIDENCE 387 (3d ed., 1983).
152. *Tamarillo*, 1982 (1) S.A., 442E-443F.
153. 1981 (2) S.A. 863 (C).
154. *Tamarillo*, 1982 (1) S.A., 443A.
155. That the *onus* of proof never shifts: *see* South Cape Corporation (Pty.) Ltd. v. Engineering Management Services (Pty.) Ltd. 1977 (3) S.A. 534 (A) 548B, *per* Corbett J.A. (now C.J.).
156. *Berry*, 1912 A.D., 350 *per* Innes J.

157. Beck, 20 C.I.L.S.A. 190, 201 (1987).
158. That a case may contain more than one issue and therefore have more than one *onus* of proof: *see* Pillay v. Krishna 1946 A.D. 946, 952 *per* Davis A.J.A.; Heneke v. Royal Insurance Co. Ltd. 1954 (4) S.A. 606 (A) 611A *per* Van den Heever J.A.
159. *Tamarillo*, 1982 (1) S.A., 443C.
160. I develop Beck's remark, 20 C.I.L.S.A., 201 ("the scenario draw by his lordship is highly unlikely ever to occur, for it should be possible to establish whether or not a third party will consent....").
161. *Cf.* Turpin's contrasting South African specific performance with English specific performance: *supra* note 145.
162. *Tamarillo*, 1982 (1) S.A., 443F-G.
163. 1986 (1) S.A., 776G-H.
164. *Id.*, 778G, H-I.
165. *Id.*, 783E-F.
166. *Wroth v. Tyler* [1974] Ch. 30.
167. *Pillay*, 1946 A.D., 954 *per* Davis A.J.A., quoting J.H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW para. 2486 *in fine* (3d ed., 1940). *See*, also, *Nydoo v. Vengtas* 1965 (1) S.A. 1 (A) 21H-22A *per* Wessels J.A.
168. *Benson*, 1986 (1) S.A., 782I-J.

## Chapter 4: Contracts of Employment (Contracts of Personal Service)

"The law regarding master and servant," said Lord Reid in *Ridge v. Baldwin*, "is not in doubt. There cannot be specific performance of a contract of service...."<sup>1</sup> The Scots law of specific implement in this area of contract down to the early twentieth century was expounded by Fraser<sup>2</sup> and Umpherston.<sup>3</sup> The law was changing along with public attitudes;<sup>4</sup> and recent statutes have introduced great variations.

### 1. The employer's action for specific implement against the employee

Under section 16 of the Trade Union and Labour Relations Act 1974,<sup>5</sup>

No court shall, whether by way of

- (a) an order of specific performance or specific implement of a contract of employment,  
or
- (b) an injunction or interdict restraining a breach or threatened breach of such a contract,

compel an employee to do any work or attend any place for the doing of work.

Section 30(1) defines a "contract of employment" as a contract of service or of apprenticeship whether express or implied and (if express) whether oral or written; and an "employee" as an individual who has entered into or works under (or if the employment has ceased, worked under) a contract of employment, otherwise than in police service. *Harvey on Industrial Relations and Employment Law* says that the section "is intended to prevent an employer seeking the court's assistance in breaking a strike by these means: but is not in terms limited to that case."<sup>6</sup> Section 16 is to the law of employment what section 4 of the Debtors (Scotland) Act 1880 is to the law of debt.<sup>7</sup>

An exception exists. If section 89 of the Merchant Shipping Act 1970<sup>8</sup> applies, a sheriff, magistrate, or justice of the peace may issue a warrant for the arrest of a seaman deserting in the United Kingdom and, once he has been arrested and the desertion proved, order him to be conveyed on board his ship.

### 2. The employee's action for specific implement against the employer

At Scots common law the employee does not generally have the right to sue the employer for specific implement and thus compel the latter to maintain the contractual relationship.<sup>9</sup> The wrongfully dismissed employee may not elect to ignore the breach of contract and demand wages.<sup>10</sup>

There is an exception. The holder of a public office who complains that the employer has not observed the proper rules for dismissal may sue for reinstatement,<sup>11</sup> though Lord Reid pointed out in *Malloch v. Aberdeen Corporation* that "[many] of [an elected public body's] servants in the lower grades are in the same position as servants of a private employer."<sup>12</sup> A declaration (in Scotland, a declarator) will in Ganz's opinion have the same practical effect as specific performance (implement) because the public authority "will invariably act in accordance with the law as declared."<sup>13</sup>

The general ban at common law is not greatly shaken by the statutory provisions on unfair dismissal.<sup>14</sup> Even if the tribunal orders the employer to reinstate or re-engage the employee, the employer cannot be compelled to do so, but will be liable for increased compensation under the Employment Protection (Consolidation) Act 1978.<sup>15</sup> *Harvey* explains that section 71(2) may speak of *orders*, but "the penalty for ignoring them is purely financial. The law shies away from forcing the employer to accept the employee, but he will have to pay for that privilege."<sup>16</sup> Similarly, increased compensation but not specific implement can be ordered under the Sex Discrimination Act 1975<sup>17</sup> and the Race Relations Act 1976.<sup>18</sup> The person who does not reinstate the employee under section 10 of the Reserve Forces (Safeguards of Employment) Act 1985,<sup>19</sup> or who dismisses the employee in breach of section 17, commits an offence, is liable to a fine, and may be ordered to compensate the employee.<sup>20</sup> But the contract will not be confirmed or continued. A permanent worker under the Dock Labour Scheme (soon to be abolished) may be reinstated by the local board.<sup>21</sup> The registered employer who refuses reinstatement after due notice by or for the National Board will not be carrying out the provisions of the scheme, and may be suspended for a specified period during which his name shall be removed from and not re-entered in the employers' register.<sup>22</sup>

Reviewing aspects of the legislation for protecting employment in the United Kingdom, Hepple wrote in 1983:<sup>23</sup>

Another concept is the 'right to work' which, in this context, means the right to remain continuously employed including the right to re-employment in the event of unjustified termination....<sup>24</sup> The central measure is the law against unfair dismissal. The statistics reveal the startling fact that only a tiny proportion of those who complain to industrial tribunals that they have been unfairly dismissed are re-employed, and that the proportion has declined since the legislation was amended, with effect from June 1976, to make re-employment the primary remedy. In 1973, 4.2 per cent of those whose cases were settled before a hearing were given back their jobs. This has fallen each

year and was only 1.6 per cent in 1980. Of those who went to a hearing, 2.3 per cent had a recommendation for reinstatement in 1973; by 1980 orders for re-employment were made in only 0.8 per cent of such cases. The median level of compensation in 1980 was £598 (about five weeks' wages at the average wage).<sup>25</sup> This may be compared with the theoretical maximum figure (in 1980) of £16,910. The reasons for this remarkable failure to provide a 'right to work' through unfair dismissals legislation have been the subject of investigation....<sup>26</sup> Among the most widely supported reasons are that employers will not accept re-employment and the tribunals are reluctant to conclude that it is 'practicable' for the employer to comply with an order, and that the tribunals and ACAS conciliation officers only pay lip service to the statutory requirement to give priority to re-employment. Moreover, the majority of dismissed workers are not, by the time their cases come up for hearing, seeking re-employment. It is interesting to compare the situation in the United States where grievance arbitrators, under collective agreements, reinstate about half of the employees whose cases are brought to arbitration, and employees wrongfully discharged for union activities are normally reinstated under the provisions of the National Labor Relations Act....<sup>27</sup> A reasonable inference from this and also the common practice of securing reinstatement in Britain where voluntary procedures are used or industrial action is resorted to, is that for an effective 'right to work' there generally has to be solid trade union backing at the workplace.

### 3. Rationale

To the extent that Scots courts justify their refusal of specific implement, they set their faces against compelling parties to enter into or maintain a close, intimate relation against their will,<sup>28</sup> and they do not feel it right to interfere with personal liberty.<sup>29</sup> Having quoted Lord Deas's pronouncement in *McMillan v. Free Church* that no one will be compelled to be preached to by a minister of the kirk, or taught by a teacher whom he has engaged,<sup>30</sup> Lord Kincairney in *Skerret v. Oliver*,<sup>31</sup> doubting whether this had been an exhaustive list, referred to *Fry on Specific Performance* for a general principle, finding it beneath the rubric "Where the enforced performance of the contract would be worse than its non-performance." (Clark in 1969 observed: "Probably it never occurred to Fry to inquire for whom it would be worse and for whom it would be better. But one does complain when contemporaries are unable to see it today."<sup>32</sup>) Paragraph 110 of the third edition,<sup>33</sup> which was the newest before *Skerret* was decided, describes the master-and-servant relations as "so personal and confidential ... that it is evident that they cannot be enforced by the Court against an unwilling party with any hope of ultimate and real success, and accordingly the Court refuses to entertain jurisdiction in



regard to them."<sup>34</sup> Paragraph 112 states: "It is not for the interests of society that persons who are not desirous of maintaining continuous personal relations with one another should be compelled to do so"; and footnote 3 on page 49 gives *De Francesco v. Barnum*, where Fry J. had ruled that awarding specific performance "would turn contracts of service into contracts of slavery."<sup>35</sup> Lord Kincairney held the English reasons common to Scots law,<sup>36</sup> and cited Fraser.<sup>37</sup>

Another noteworthy passage in a Scots judgment is where Lord Pitman in *Murray v. Dumbarton County Council* (1935) held: "At common law this Court will never compel a man to continue a contract of service if he has wrongfully terminated it."<sup>38</sup> As Murray was resisting transfer from Lenzie Academy, the council's decision was taken against his will; and Lord Pitman's words imply that the contract-breaker can unilaterally end the contract, leaving the aggrieved party without the election whether to ignore the breach and, if he thinks it necessary, insist on fulfilment of the contract; or else to resign himself to its ending and claim damages in lieu of implement. To Lord Deas's example of the teacher, Lord Pitman added "the homely illustration" of the cook whose services could not be forced on the employer.<sup>39</sup>

### South African law

South African judges used to approach the contract of personal service in much the same way as Scots and English. The *locus classicus*, though *obiter dictum* for ordinary servants, appeared in a decision about reinstatement of a civil servant; Innes C.J. held in *Schierhout v. Minister of Justice* (1926):<sup>40</sup>

Now, it is a well established rule of English law that the only remedy open to an ordinary servant who has been wrongfully dismissed is an action for damages. The Courts will not decree specific performance against the employee, nor will they order the payment of the servant's wages for the remainder of his term. Macdonell (*Master and Servant*, 2nd ed. p. 162), however, points out that the Equity Courts did at one time issue decrees for specific performance. But the practice has long been abandoned, and for two reasons; the inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship; and the absence of mutuality, for no Court could by its order compel a servant to perform his work faithfully and diligently. The same practice has been adopted by the South African Courts, and probably for the same reason. See *Wolhuter v. Lieberman* 20, C.T., p. 116), and cf. *Hunt v. Eastern Province Boating Co.* (111 E.D.C., at p. 23). No case was quoted to us where a master has been compelled to retain the services of an employee wrongly dismissed, or to pay him his wages as such, and I know of none. The remedy has always been damages. Whether this was so in the civil law it is not necessary to decide. ... [I]t may be taken that South African practice in

regard to the remedy of an ordinary servant for wrongful dismissal is the same as the practice of the Courts of England.

Mutuality, though mentioned in paragraphs falling under the rubric referred to by Lord Kincairney in *Skerret*, is not expressly produced as a justification by Scots courts. The orthodox<sup>41</sup> Australians Meager, Gummow, and Lehane<sup>42</sup> regard the most accurate definition of mutuality as Spry's in the second edition of *Equitable Remedies*;<sup>43</sup> in the third edition the passage is reworded but effectively the same:<sup>44</sup>

The defence of lack of mutuality arises in proceedings for specific performance where, if the defendant were ordered to perform specifically his contractual obligations he would not himself be sufficiently protected in view of such unperformed obligations of the plaintiff as might not be susceptible of subsequent specific enforcement, and an order of specific performance would be unjust in all the circumstances.

This is similar to Dixon J.'s ruling in *J.C. Williamson Ltd. v. Lukey and Mulholland*.<sup>45</sup> The doctrine is puzzling and subject to many exceptions, to which employment contracts could, if necessary, be admitted as yet another;<sup>46</sup> and no great benefit would result if the additional obfuscation provided by this doctrine were allowed to envelop the Scots law on the present topic.

Innes C.J. then distinguished the ordinary servant from the civil servant "who contracts at his appointment that he will serve the State in accordance with the statutes and statutory regulations from time to time operative" which "contain elaborate provisions regarding the removal of civil servants, from which it follows that they can only be removed in accordance with those provisions." If domestic tribunals diverge from these provisions, the law courts will intervene. "It is this entrenchment against arbitrary dismissal which differentiates the position of a civil servant from that of an ordinary employee."<sup>47</sup>

*Schierhout* has often been applied, as the list in *Ngewu and Others v. Union Co-operative Bank and Sugar Co. Ltd.* shows.<sup>48</sup>

In *Myers v. Abramson*<sup>49</sup> a doctor's claim for specific performance took the form which in Scots law according to *White & Carter (Councils) Ltd.* would not be regarded as specific implement: he claimed the balance of his fee as the defendant's medical adviser. Van Winsen J. rejected statements in *Gracie v. Hull, Blythe & Co. (S.A.) Ltd.*;<sup>51</sup> *Beaton v. Peninsula Transport Co. (Pty.) Ltd.*;<sup>52</sup> and *Rogers v. Durban Corporation*<sup>53</sup> that as the contract-breaker's wrongful dismissal ended the contract, no contract remained to be enforced specifically; and, referring to *Venter v. Livni*,<sup>54</sup> *Wessels*,<sup>55</sup> *Bacon v.*

*Hartshorne*,<sup>56</sup> and *Delaney v. Medefindt*,<sup>57</sup> he held that lawful rescission was by parties' consent or a competent court's lawful order, and unjustifiable repudiation entitled the victim to an election whether to uphold the contract and claim specific performance, or cancel and claim damages.<sup>58</sup> Employment contracts were no exception. "Whether the Courts would be prepared to grant specific performance in contracts of this nature is another matter."<sup>58</sup> When we refer to Scots cases such as *Murray* and *First Edinburgh Building Society v. Munro* (1884), where unlawful dismissal was held to give the employee no claim for wages but only one for damages, Van Winsen J.'s contrasting words apply with point:<sup>59</sup>

I doubt whether the practice of the Court in allowing only the particular remedy of damages to the wrongfully dismissed employee can rightfully be elevated to a rule of law to the effect that such contracts can be unilaterally terminated so that under no circumstances whatsoever can they be specifically enforced.

The judge then considered the *prima facie* rule in *Berry*,<sup>60</sup> and also the judgment in *Schierhout*. Counsel had tried to distinguish *Schierhout* from the present facts, in that *Schierhout* had claimed on an unexpired contract, and Myers was claiming on a contract whose time had run: so that Myers's services would not be forced on his patient. The judge rejected the argument: only damages would be allowed; mutuality was lacking; specific performance was refused.

*Schierhout* was also followed in *Gründling v. Beyers and Others*,<sup>61</sup> where a general secretary of the Mine Workers' Union was held not to occupy a statutory or quasi-statutory office, and was found to be antagonistically regarded by the executive committee, on whom he should not be foisted. Citing *Francis v. Kuala Lumpur Municipality*<sup>62</sup> and *Ngwenya v. Natalspruit Bantu School Board*,<sup>63</sup> Trollip J. denied the possibility of ordering interdict or other declaratory order, because they were decided along principles similar to those of specific performance.<sup>64</sup>

Myers was the sole reference given in *Stewart Wrightson (Pty.) Ltd. v. Thorpe* (1977)<sup>65</sup> when Jansen J.A. held that the breach of Thorpe's service contract as a director and insurance broker had been degrading and, tested objectively, fundamental. "As in other contracts, this did not *per se* end the contract, but served only to vest [Thorpe] with an election either to stand by the contract or to terminate it...."<sup>66</sup> Now that employment contracts are, on the highest judicial authority, no exception to the general rule, Brassey<sup>67</sup> refers to *Cole v. Stewart*<sup>68</sup> and *White & Carter (Councils) Ltd.* After *Thorpe*, *Stag Packings*,<sup>69</sup> and *Benson*,<sup>70</sup> it is now a live issue whether *Smith v.*

*Weeks*<sup>71</sup> should still yield to *South African Harness Works v. South African Publishers Ltd.*,<sup>72</sup> as Kerr suggests:<sup>73</sup> for no longer can the employer be quite so sure that the Supreme Court will refuse to grant specific performance to the employee who elects not to content himself with damages. An immediate distinction is that, whereas the sum in *White & Carter (Councils) Ltd.* could be earned without the contract-breaker's cooperation, most employees earn their wages and collateral benefits by using the employer's premises and resources; but it is thought that offering one's services will suffice. South African judges would also impose Lord Reid's *caveat* about the claimant's having a legitimate interest in the continuation of wasteful performance when damages would be adequate remedy. McMullen,<sup>74</sup> however, refers to Lord Denning M.R.'s examples in *Hill v. C.A. Parsons Ltd.*,<sup>75</sup> of the "need to accrue constructive service for full pension entitlement (where damages in lieu might be difficult to assess) or where ... occupation of property under a service occupancy was desired." In turn, Scots courts seeking to overcome the theory that wrongful dismissal automatically terminates a service contract might read *Thorpe* before overruling *Munro*<sup>76</sup> and allowing *White & Carter (Councils) Ltd.* to operate in the employee's favour.

Although both actions are forms of specific performance in South Africa, a wages claim is one way of enforcing a contract, and a claim for reinstatement-- "the replacement of a dismissed [employee] in his post so that he can perform the work attaching to the post"--<sup>77</sup> is quite another, being the result which Lords Deas, Kincairney, and Pitman so vigorously refused to effect. The South African experience has latterly been rather different.

In *Haynes* the Appellate Division gave, as the fourth example of a ground on which the courts had, in the exercise of their discretion, refused specific performance, those contracts where the remedy "entails the rendering of services of a personal nature."<sup>78</sup>

The Appellate Division had already, however, ordered specific performance of a duty to restore shares to an official list of quotations on the Johannesburg Stock Exchange, holding that the services did not require continuous, personal, confidential relations to be maintained.<sup>79</sup>

"Continuous, personal, confidential": these (the last the most important) are the watchwords that guide the court in a given dispute. So in *Pougnat v. Ramlakan* the manager of a sugar farm wanted to remain in his job.<sup>80</sup> Though his running of the farm was fairly independent of the owner's supervision, and personal contact would be rare, it was held that his misdelivering sugar cane to Chaka's Kraal mill, rather than to

the Glendale mill where the owner had a quota under the sugar industry agreement, had so weakened the owner's confidence in him as to justify the court's refusal of specific performance. By contrast, in *Dublin v. Diner* specific performance was claimed by a director and minority shareholder who was held not to be a servant.<sup>81</sup> Though harsh words had been exchanged by the parties, they had later met amicably; the "two men are not tender hot-house plants ... [but] hard-headed business men";<sup>82</sup> the defendant had been paid £31,500 under the agreement; and the parties' continuous confidential relationship would, in the judge's view, not be undermined by what the plaintiff when giving evidence had said about the defendant. Specific performance was ordered.

*Haynes* was once again applied by a Transvaal Full Bench in *National Union of Textile Workers and Others v. Stag Packings (Pty.) Ltd. and Another* (1982)<sup>83</sup> when reversing the decision of Nestadt J.<sup>84</sup> Van Dijkhorst J. held that if "the unilateral repudiation of an employment contract by one party thereto, which is not accepted by the other party, is ineffective, the distinction drawn by [Innes C.J. in *Schierhout* between ordinary servants and civil servants] is ... one without a difference."<sup>85</sup> The two reasons given by Innes C.J. for not specifically enforcing the contracts of ordinary servants-- the one, as to compulsion and confidentiality; the other, as to mutuality-- were "practical considerations and not legal principles."<sup>86</sup> Judgments by provincial and local divisions which Van Dijkhorst J. surveyed had followed *Schierhout* but not mentioned *Haynes*.<sup>87</sup>

Nor was the ambit of a Court's discretion when deciding to refuse an order for specific performance, and the fact that each case has to be decided in the light of its own circumstances, considered. The *dictum* in *Schierhout's* case which was a pronouncement of a general approach to matters of this nature was treated as a legal principle which precluded further investigation of other relevant considerations. In my view this is erroneous. Cf the censure by CORBETT J.A. [now C.J.] of the hardening of a rational and common sense exercise of the Court's discretion into an accepted general inflexible rule in *Southern Cape Corporations (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 547G. The Appellate Division did not in *Haynes'* case, when laying down the approach to the granting of orders for specific performance, exclude the case of an ordinary servant. There was no reason to do so. In my view the approach to the application of the discretion in respect of specific performance laid down in *Haynes'* case is equally applicable to the case of the wrongful dismissal of an ordinary servant.

This does not mean that the considerations mentioned in *Schierhout's* case why in such a case an order for specific performance should generally speaking not be granted, should be disregarded. They are weighty and in the normal case they might well be conclusive. But that is a far cry from saying that the Court should therefore close its eyes to other material factors and refuse to evaluate them.

The court dismissed the defendant owner's preliminary objection to the action raised by the trade union and other employees for declarator after a dispute over union membership.

The *ratio decidendi* of *Stag Packings* was applied in *Myburgh v. Daniëlskuil Munisipaliteit* (1985).<sup>88</sup> A clinic nurse had assisted in a shop in a Black residential area during her working hours. Hattingh A.J. held that he had a discretion whether to set aside the dismissal and reinstate her. He decided that her contractual relationship with the municipality was not close, her salary being paid by the Department of Health. But members of the public, as taxpayers, had probably learned of her behaviour with displeasure; the municipality had a duty to put right this disturbing matter; her anonymous letter to the mayor after her dismissal had worsened the relationship; she admitted assisting in breach of regulations: the municipality had lost confidence in her.<sup>89</sup> The application was refused.

In *Tshabalala and Others v. Minister of Health and Others* (1987)<sup>90</sup> Goldstone J., mindful that *Stag Packings* justified his exercising a discretion whether to order specific performance, held that as "a matter of public policy I do not believe that a Court should order the reinstatement of an employee who admits or is found to have participated in an illegal strike.... [S]uch conduct subverts the very purpose and being of the profession which such person is seeking to join."<sup>91</sup> The applicants were trainee nurses. They sought a declaratory order setting aside their dismissal and interdicting their eviction from a hostel at Baragwanath Hospital, and were treated differently by the court, according as to proof of or doubt as to participation in an illegal strike.

Finally, in *Mkize and Others v. Tembisa Town Council and Another* (1987)<sup>92</sup> the applicants had unsuccessfully submitted a list of grievances concerning their treatment by the employer after a stay-away strike, and including demands for reinstatement, recognition of their trade union, dismissal of three employees with whom they were unwilling to work, and increases of salary. They were unlawfully dismissed and, with their families, ejected from their housing. Arrests and prosecutions followed. Strydom J. quoted *Stag Packings* and cited *Tshabalala*,<sup>93</sup> and held that although he had a discretion to reinstate the applicants, the evidence of mutual distrust was so strong that reinstatement "could and would only lead to further strife, misgivings and dissatisfaction."<sup>94</sup>

After *Stag Packings*, Brassey points out, the employee will have to decide whether he wants specific performance in the form of remuneration, or else in the form of reinstatement.<sup>95</sup> Though *Bramdaw v. Union Government* (1931)<sup>96</sup> denied judicial

competence to order reinstatement of employees entrenched by statute, Brassey considers that the possible reason-- "reluctance to foist an employee on an unwilling employer"--<sup>97</sup> should not prevent the appropriate order of reinstatement of an employee who, for example, has been badly treated for trade-union activities, or whose contractual relationship with the employee is not personal. Haysom and Thompson wish that Van Dijkhorst J. had expressly recognized the great economic changes since *Schierhout*. "Personal relationships of trust are the exception and not the form when one views the position of relationships in an industrialized society."<sup>98</sup> If that is so, then Voltaire's words come to mind: "Quand les besoins ont changé, les lois qui sont demeurées sont devenues ridicules."<sup>99</sup> Sharpe even argues that worry over trust and confidence is, on its own, an unconvincing ground of refusal when the job is "clearly defined, relatively impersonal, and allows for a readily measurable performance."<sup>100</sup>

Interdict may be granted to prevent breach of a negative obligation in the contract. *Roberts Construction Co. Ltd. v. Verhoef*<sup>101</sup> introduced the English doctrine of *Lumley v. Wagner* (the decree enjoining the defendant opera singer from performing at any theatre other than the plaintiff's in Covent Garden during her three-month contract)<sup>102</sup> into South African law. Though enforcing the restraint-of-trade clause would indirectly compel the fulfilment of the contract,<sup>103</sup> Dowling J. narrowed its scope to the applicant's work, the building industry as defined by current wage determination and industrial agreement, after he had been assured that the employee could exercise his skill in other areas of employment<sup>104</sup> and would not have to choose "idleness and starvation [or else] specific implementation of his positive agreement to work for"<sup>105</sup> Roberts Construction. Christie<sup>106</sup> regrets the adoption of *Lumley* and its attendant qualifications, particularly because English judgments, in contrast with South African, are based on the general rule that damages are adequate and injunction is extraordinary. "The problem of the deserting employee would be better handled by asking simply whether he is in breach of his contract and whether an interdict to forbid that breach would transgress the principles preventing an order of specific performance of the contract of service." Since *Stag Packings* no employer has to my knowledge succeeded in an action for specific performance against the employee; on the contrary, in *Tiger Bakeries Ltd. v. Food & Allied Workers Union and Others* (1988),<sup>107</sup> Curlewis J. refused to prevent a union from instigating a ban on the overtime which employees were contractually obliged to work, saying, "I will not make an order which has the effect, directly or indirectly, of making people work."<sup>108</sup> Provided one accepts that interdict can be ordered in terms permitting the employee some freedom of choice whether or not

to resume working for the successful applicant, Curlewis J.'s point stands. The South African law of interdict on this topic seems broadly similar to that of Scotland, where some freedom of choice will have to be allowed to the employee,<sup>109</sup> who might otherwise argue that a clause so general as to leave him with the alternative of idleness and starvation, or else attendance at the pursuer's premises, will conflict with section 16 of the Trade Union and Labour Relations Act 1974.

In Hepple's view, the British law of unfair dismissal is not working very well. Scots courts, if they are to have any scope for applying principles of specific implement and the action for an agreed money sum in the way suggested by South African judgments on specific performance, would first have to overrule the cases establishing that the employer's wrongful dismissal automatically terminates the employee's contract. Thereafter employees would be able to contend that, modern working conditions having altered since the days of *Murray* and *Skerret*, it should be competent for a court, rather than automatically refusing specific implement simply because the contract, as one of employment, falls under a standard exception, to exercise a discretion in the particular dispute before it and thus examine how personal is the relationship between the parties, and how reasonable are the prospects of their maintaining a professionally cordial attitude after reinstatement, if that remedy has been claimed.

### Notes

1. [1964] A.C. 40, 65, followed by *Ld. Avonside in Malloch v. Aberdeen Corporation* 1971 S.C. (H.L.) 85, 94. *Cf.*, *McClelland v. Northern Ireland Health Board* [1957] 2 All E.R. 129 (H.L.) 140*c*, *per* *Ld. Evershed* ("an orthodox statement of legal principle": *Ganz*, 30 M.L.R. 288, 297 (1967)).
2. P. FRASER, *TREATISE ON MASTER AND SERVANT* 101-111; 162; 382; 392; 484 (3d ed. by W. Campbell, 1882).
3. F.A. UMPHERSTON, *THE LAW OF MASTER AND SERVANT* 132-6 (1904); 14 J.R. 69 (1902).
4. *Cf.* *Rose Street Foundry and Engineering Co. v. John Lewis and Sons* 1917 S.C. 341 (2d Div.), 351 *per* *Ld. Salvesen*.
5. (c. 52).
6. *INDUSTRIAL RELATIONS AND EMPLOYMENT LAW I*. [240.01] (Editor-in-Chief, the late R.J. Harvey, 1988).
7. *Supra*, introduction.
8. (c. 36).
9. FRASER, *MASTER AND SERVANT* 162; *Graham v. Thomson*, 1822, 1 S. 343 (1st Div.) (domestic servant); *Mason v. Scott's Trustees*, 1836, 14 S. 343 (2d Div.) (schoolmaster in school in private foundation); *McMillan v. Free Church*, 1861, 23



- D. 1314 (1st Div.); *McArthur v. Lawson*, 1877, 4 R. 1134 (1st Div.), 1138 *per* Ld. Shand; *Cormack v. Keith & Murray*, 1893, 20 R. 977 (1st Div.) (law agent); *Skerret v. Oliver*, 1896, 23 R. 468 (1st Div.) esp. 485-6 *per* L.O. (Kincairney); *Kerrigan v. Hall*, 1901, 4 F. 10 (1st Div.), 16 *per* Ld. McLaren; *Rose St. Foundry*, 1917 S.C. 341, 351; *Murray v. Dumbarton County Council* 1935 S.L.T. (O.H.) 239. *Cf.*, *Southern Foundries (1926) Ltd. v. Shirlaw* [1940] A.C. 701, 723 *per* Ld. Wright: "No one, individual or company, can be compelled against his or their will, to employ a man, though, if the contract is broken, damages will have to be paid."
10. *First Edinburgh Building Society v. Munro* (1884) 21 S.L.R. 291 (1st Div.).
  11. *Ridge; Malloch: supra*, note 1; 9 STAIR MEMORIAL ENCYCLOPAEDIA paras. 38-40 (1987).
  12. *Malloch*, 1971 S.C. (H.L.), 104.
  13. *Ganz*, 30 M.L.R., 297.
  14. For a comparative study of unfair dismissal, with references to South African, English, German, and U.S. law, *see* Cassim, 5 INDUSTRIAL LAW JOURNAL 275 (S.A.).
  15. (c. 44), sections 69-71; Employment Act 1980 (c. 42), Sched. 1; Employment Act 1982 (c. 46), section 5.
  16. HARVEY, INDUSTRIAL RELATIONS II [1418].
  17. (c. 65), sections 65(1)(c), 65(3)(a).
  18. (c. 74), sections 56(1)(c), 56(4).
  19. (c. 17).
  20. *Id.*, also, section 18.
  21. Dock Workers (Regulation of Employment) (Amendment) Order 1967, S.I. 1967 No. 1252, para. 14A.
  22. *Id.*, para. 16.
  23. B. Hepple, *Individual Labour Law*, in INDUSTRIAL RELATIONS IN BRITAIN 393 at 409 (G.S. Bain, ed., 1983).
  24. *Id.*, citing Hepple, 10 INDUSTRIAL LAW JOURNAL 65, 76 (1981) (U.K.).
  25. Hepple, *supra* note 23, 409 n. 4: "The statistics are derived from the *Employment Gazette*, 1977, p. 1078; 1978, p. 555; 1979, p. 866; 1981, p. 82; 1981, p. 539."
  26. Hepple, *supra* note 23, 409, citing Dickens, Hart, Jones, Weekes, 10 I.L.J. 160 (1981) (U.K.); K. WILLIAMS & D. LEWIS, THE AFTERMATH OF TRIBUNAL REINSTATEMENT AND RE-ENGAGEMENT (Research Paper No. 23) (1981); and Lewis, 19 BRITISH JOURNAL OF INDUSTRIAL RELATIONS 316 (1981).
  27. Hepple, *supra* note 23, 409, citing F. ELKOURI & E.A. ELKOURI, HOW ARBITRATION WORKS 648 (3d ed., 1973).
  28. *McArthur*, 4 R., 1138 *per* Ld. Shand.
  29. *Kerrigan*, 4 F., 16 *per* Ld. McLaren.
  30. *McMillan*, 23 D., 1345.
  31. *Skerret*, 23 R. 485-6.
  32. *Clark*, 32 M.L.R. 532, 537 (1969).
  33. E. FRY, TREATISE ON SPECIFIC PERFORMANCE (3d ed. by E. Fry and E.P. Fry, 1892).

34. *Id.*, p. 48 n. 5 refers to *Gillis v. McGhee* 13 Ir. Ch. R. 48, 57 (1861); *White v. Bobby* 26 W.R. 133 (1877); *Rigby v. Connol* (1880) 14 Ch.D. 482 (no property removed from the complainer in a personal service contract); *De Francesco v. Barnum* (1889) 45 Ch.D. 430.
35. *Barnum*, 45 Ch.D., 438. Also cited were *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. 416 (C.A.); and *Bainbridge v. Smith* (1889) 41 Ch.D. 474 (C.A.). For the modern law of England and some kindred systems on specific performance of personal-service contracts, see SHARPE, INJUNCTIONS AND SPECIFIC PERFORMANCE 296-302; MEAGHER, GUMMOW & LEHANE, EQUITY 479-80; SPRY, EQUITABLE REMEDIES 111-4 (3rd ed., 1984); JONES & GOODHART, SPECIFIC PERFORMANCE 135-9; TREITEL, CONTRACT 792-4 (7th ed., 1987).
36. *Skerret*, 23 R., 486.
37. FRASER, MASTER AND SERVANT 162.
38. 1935 S.L.T. (O.H.), 239.
39. *Id.*, 240.
40. 1926 A.D. 99, 107.
41. See, e.g., their criticisms of *United Scientific Holdings v. Burnley Borough Council* [1978] A.C. 904; MEAGHER, GUMMOW, & LEHANE, EQUITY xi, 39, 65-6.
42. EQUITY 491.
43. SPRY, EQUITABLE REMEDIES 83 (2d ed., 1980).
44. *Id.*, 85 (3d ed., 1984).
45. (1931) 45 C.L.R. 282 (H.C.) 298.
46. See Groenewald, Specific Performance chapter 4; 614 (criticizing *Schierhout*); and Brassey, 2 I.L.J. 57, 70-1 (1981) (S.A.).
47. *Schierhout*, 1926 A.D., 108, 109.
48. 1982 (4) S.A. 390 (N) 400H.
49. 1952 (3) S.A. 121 (C).
50. 1962 S.C. (H.L.) 1.
51. 1931 C.P.D. 539.
52. 1934 C.P.D. 53.
53. 1950 (1) S.A. 65 (D) 69.
54. 1950 (1) S.A. 524 (T).
55. WESSELS, CONTRACT Vol. 1, paras. 1991-6; Vol. 2, para. 2917.
56. 16 S.C. 230.
57. 1908 E.D.C. 200, 205.
58. *Myers*, 1952 (3) S.A., 123.
59. *Id.*, 124.
60. 1912 A.D. 343, 350.
61. 1967 (2) S.A. 131 (W) 146-7.
62. [1962] 1 W.L.R. 1411 (P.C.).
63. 1965 (1) S.A. 692 (W).

64. 1967 (2) S.A., 147D.
65. 1977 (2) S.A. 943 (A).
66. *Id.*, 952A.
67. Brassey, 2 I.L.J., 59 n. 15 (S.A.).
68. 1940 A.D. 399, 414.
69. 1982 (4) S.A. 151 (T); *see supra* page 104 and n. 83.
70. 1986 (1) S.A. 776 (A).
71. 1922 T.P.D. 235.
72. 1915 C.P.D. 43.
73. KERR, CONTRACT 382-3.
74. McMullen, [1982] 41 C.L.J. 110, 132 and n. 7.
75. [1972] 1 Ch. 305, 314 (C.A.).
76. (1884) 21 S.L.R. 291.
77. *Bramdaw v. Union Government* 1931 N.P.D. 57, 78; *Hodge v. Ultra Electric* [1943] 1 K.B. 462, 465, 466; Brassey, 3 I.L.J. 247, 268 and n. 114 (S.A.).
78. 1951 (2) S.A. 371 (A) 378.
79. *Johannesburg Stock Exchange v. Northern Transvaal (Messina) Copper Exploration Co.* 1945 A.D. 529, 540. *Cf. Beryl Mining Co. Ltd. v. J.S.E.* 1945 T.P.D. 445; and *see, also, Industrial & Mercantile Corpn. v. Anastassiou Bros.* 1973 (2) S.A. 601 (W).
80. 1961 (2) S.A. 163 (D).
81. 1962 (4) S.A. 36 (N).
82. *Id.*, 41.
83. 1982 (4) S.A. 151 (T).
84. 1981 (4) S.A. 932 (W).
85. 1982 (4) S.A., 155G.
86. *Id.*, 157C.
87. *Id.*, 158.
88. 1985 (3) S.A. 335 (NC).
89. *Id.*, 347.
90. 1987 (1) S.A. 513 (W).
91. *Id.*, 523B.
92. (1987) 8 I.L.J. 256 (W)(S.A.).
93. *Id.*, 270.
94. *Id.*, 271J.
95. Brassey, 3 I.L.J., 267-8 (S.A.). Brassey was one of the winning counsel in *Stag Packings*.
96. 1931 N.P.D., 58.
97. Brassey, 3 I.L.J., 268 (S.A.).
98. Haysom and Thompson, 4 I.L.J. 1, 6 and n. 30 (1983), citing A. FOX, *BEYOND CONTRACT* 152-207 (1974) and P. SELZNICK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* ch. 4 (1969).

99. VOLTAIRE, DICTIONNAIRE PHILOSOPHIQUE, s.v. "Lois" section III in 36 OEUVRES DE VOLTAIRE 395 (éd. 1821).
100. SHARPE, INJUNCTIONS AND SPECIFIC PERFORMANCE 299.
101. 1952 (2) S.A. 300 (W).
102. 1 De G., M. & G. 604 (1852); 42 E.R. 687. *See*, also, the survey of English doctrine in *Tension Envelope Corporation (S.A.) (Pty.) Ltd. v. Zeller and Another* 1970 (2) S.A. 333 (W) by Franklin A.J., who as a judge concurred in *Stag Packings*.
103. *Verhoef*, 1952 (2) S.A., 305H, 306H *per* Dowling J. *Cf.* Holmes J.'s observations in *Rice v. D'Arville*, *Notes*, 8 HARV. L. REV. 172 (1894-5), and *Javierre v. Central Altagracia*, 217 U.S. 502, 508 (1910) (U.S.S.C.): "There is a certain anomaly in granting the half-way relief of an injunction against disposing of the crops elsewhere when the Court is not prepared to enforce the performance to accomplish which indirectly is the only objective of the negative decree"; Stevens, 6 CORNELL L.Q. 235, 253 (1920-21). For defence of *Lumley*, *see* MEAGHER, GUMMOW, & LEHANE, EQUITY 545.
104. 1952 (2) S.A., 309.
105. *Id.*, 307-8.
106. CHRISTIE, THE LAW OF CONTRACT 515-6.
107. (1988) 9 I.L.J. 82 (W) (S.A.).
108. *Id.*, 87D.
109. 9 STAIR MEMORIAL ENCYCLOPAEDIA para. 195.

## Chapter 5: Impossibility of Enforcing a Decree of Specific Implement

Before section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 was passed,<sup>1</sup> Scots courts used sometimes to refuse specific implement when they could not render an effective decree because the defender could not be imprisoned for possible disobedience to the decree. Gloag explained in 1926:<sup>2</sup>

As the only method of compelling obedience to a decree *ad factum praestandum* is the imprisonment of the defender, it would seem that where the defender is a corporate body, which cannot be imprisoned, an action concluding for the performance by such a defender of some act which cannot be performed vicariously must be incompetent because futile, unless an alternative conclusion for damages in the event of non-performance be added.

The case apparently establishing this restriction in Scots law was *Gall v. Loyal Glenbogie Lodge of the Oddfellows Friendly Society*,<sup>3</sup> a claim by a postman against a lodge and its trustees (Reid, Mackie, and Angus) for reinstatement. He had threatened resignation, had then been expelled and had unsuccessfully submitted contributions and wished to attend meetings. Appealing to the District Committee at Dufftown, he was reinstated; but the Glenbogie lodge refused to implement this decision: whereupon, under section 68 of the Friendly Societies Act 1896,<sup>4</sup> he turned to the sheriff court. Sheriff-substitute Robertson thought that the decree for implement would be unenforceable; and his opinion was confirmed by the Second Division. Most judges merely denied the enforceability of such a decree; Lord Trayner attended to the problem extensively:<sup>5</sup>

The Sheriff could not, I think, enforce his own order, if the respondents refused obedience to it; and, in my opinion, he is not bound to pronounce any decree which may be disobeyed without his having the means of enforcing obedience to it. The suggestion that the Sheriff's decree could be enforced by imprisonment of the whole members of the respondents' Lodge is out of the question. Nor would it be competent or right to select the office-bearers or certain individual members of the Lodge, and ordain them, under the sanction of imprisonment, to reinstate the appellant. That would be ordering them to do what they cannot do. The office-bearers of the Lodge cannot reinstate the appellant, however willing they might be. That must be done by the Lodge itself if it is done at all. I think, therefore, the Sheriff-substitute was right in dismissing this application as one which he could not grant, with the effect which the appellant desires to accomplish.

Thirteen years later, Lord Kinnear in *Lochgelly Iron and Coal Co. v. North British*

*Railway Co.* added his doubts whether companies were liable to actions *ad factum praestandum*.<sup>6</sup>

To show that the problem lay in the effective diligence, the First Division in *Collins v. Barrowfield Lodge of the Caledonian Order of United Oddfellows Friendly Society*<sup>7</sup> distinguished *Gall* where a man sought declarator of his society membership and his entitlements to the consequent benefits, and payment of sick benefits; or, alternatively, repayment of certain sums. He had been expelled for misstating his age when applying to join the lodge, and a series of appeals to the society's tribunals ensued, he alleging inadvertence and the lack of fraudulent intent. His first alternative crave was granted by the Court of Session. Lord President Strathclyde reversed Sheriff-substitute Thomson's finding of incompetence which amounted to holding that "although the pursuer is confessedly a member of his Friendly Society, yet a Court of law is powerless to aid him in vindicating his rights as a member. Now, such a confession of impotence is not readily given by any Court of Justice...."<sup>8</sup> He and Lords MacKenzie and Skerrington held that their decree would be effective. Reasons were not assigned. We assume that effectiveness would derive from pointing for the payment of the money sums. But in granting declarator of membership, was the First Division, by refusing to countenance the pursuer's expulsion, not in effect pressing his membership on the Society; and if his name had been removed from the register, would the court then have ordained it to be restored, on pain of imprisonment or, perhaps, of the court officer's being authorized to enter the society's buildings and restore the name to the register,<sup>9</sup> criminal sanctions to befall anyone who obstructed the officer or tampered with his restoration of Collins's name to the register?

The courts' refusal of specific implement because of inability to imprison the defender may have been without foundation when *Gall* was decided. As Gloag remarked,<sup>10</sup> in *Delaney v. Directors of Edinburgh and Leith Children's Aid and Refuge* decree *ad factum praestandum* was ordained against directors:<sup>11</sup> the appellant's children had been withheld from him by Miss Stirling, formerly of the defenders' organization. As the headnote reads:<sup>12</sup>

The directors maintained that they were not responsible for the delivery of the children, in respect that (1) they were not parties to their removal, and had never had them in their custody since; and (2) that they had intimated to the father the return of the children to this country in order that he might recover them if he wished to do so.

Lord President Inglis held that the directors had to do much more than that: they had

failed in their duty by allowing Miss Stirling to conceal the children; and "it would be hardly consistent with the duty of the Court to abstain from pronouncing an order against the respondents for the redelivery of the children."<sup>13</sup> Lord President Inglis seems to have suffered none of Lord Kinnear's doubts about the enforceability of specific implement against companies; as Lord Justice-Clerk, he had not objected to Lord Cowan's *obiter dicta* in *Sutherland v. Montrose Shipbuilding Co.* about the competence of the remedy against a shipbuilding company.<sup>14</sup> And it is submitted that in two other cases on custody of children he showed the way to the possible compulsitor against an organization which, as Coke put it, "cannot be beaten. ... [I]ts existence being ideal, no man can apprehend or arrest it.... Neither can a corporation be excommunicated; for it has no soul."<sup>15</sup>

In *Ross v. Ross*<sup>16</sup> the petitioner had been in mental asylums, and on his discharge with appropriate medical certificates, was unable to gain access to his children, whose whereabouts were concealed by his wife and the trustees of her separate estate. He petitioned the Court of Session to ordain legal officers to search for and take custody of the children; to serve the petition on his wife personally or at her last known address, and upon her law agents; to ordain her appearance to inform the court of the children's whereabouts; to interdict removal of the children from Scotland; to appoint her to lodge answers within eight days of service; to find that the petitioner was entitled to custody; and to ordain delivery of the children. The court's interlocutor ordained that the petition should be served on the wife and her law agents; and that she should lodge answers within six days of service. Service took place, but the law agents did not know her whereabouts. Her sister refused to help in the search; and she herself did not appear in court as appointed. So the petitioner informed the court of her separate income held in trust for life-rent use; remissions of money from this by her trustees through her law agents were enabling her to continue in open contempt of the court's authority. The only effective way of forcing her obedience was to sequester the income of the trust-funds and interdict continued payment. The crave ended with a prayer for the appointment of a judicial factor to receive the income and retain it until the court should make further orders, but with power to pay the children's maintenance. The court's interlocutor for the posting and serving of this petition drew response from the trustees of the marriage contract and the testamentary trustees of the wife's mother. The petitioner's counsel pleaded:<sup>17</sup>

The subject owed obedience to the Crown. Jurisdiction was bestowed on the Court by Royal warrant, and therefore disobedience to the Court's order was interpreted as disobedience to the Crown. To this principle was traceable ... the form and operation of personal diligence,<sup>18</sup> and on this principle depended ... the inherent power of the Court to make operative its jurisdiction and punish for contempt.

As the wife could not be arrested because she was hiding, sequestration would impede her continued, deliberate contempt. English practice supported the petitioner.<sup>19</sup> Counsel for the respondents pleaded that the procedure was "without precedent, and amounted to the introduction of a new form of diligence."<sup>20</sup>

The court's interlocutor for the service of this second petition was effective. The wife "appeared by counsel, and stated that she had returned to Scotland, and that she undertook to abide the judgment of the Court in the first petition at her husband's instance."<sup>21</sup>

Ross was cited in *Edgar v. Fisher's Trustees*,<sup>22</sup> where the court had awarded the petitioner the custody of his daughter, who was with her maternal aunt. Defiance was offered to the court's decree; the aunt was thought to have removed the child to England. A second petition prayed:<sup>23</sup>

the Court to ordain [the aunt] to appear personally at the bar, and in the event of her failing to do so to sequester her estate, to appoint a judicial factor thereon, and to interdict the trustees on a trust-estate in which she had an interest from paying to or on behalf of [her] any of the trust funds otherwise than to the judicial factor.

When the aunt failed to appear, Lord President Inglis held: "I think the respondent in this petition is in manifest contempt of Court, and she appears to have gone away for the purpose of avoiding the orders of the Court. In these circumstances, I think the Court has power to sequester her estate."<sup>24</sup> Relief was granted substantially as prayed; the interlocutor is a model specimen of the sequestration of the contemnor's estate and the appointment of a judicial factor.<sup>24</sup>

The following year<sup>25</sup> the aunt petitioned the court for recall of the sequestration and of the factory, averring that she had without success attempted to persuade the child to return to her father, and pleading that she (the aunt) should be excused attendance at court on the grounds of ill-health. The court placed the interests of the child uppermost; ordained that she need not return to her father against her will but could remain, as she preferred, with her aunt; and suspended the sequestration and factory. One of the



concurring judges was Lord Kinnear;<sup>26</sup> and it may be regretted that he did not adapt the doctrine of *Ross* and *Edgar* to the case of a company which cannot be imprisoned and therefore, as regards a decree *ad factum praestandum*, is in effect permanently absent when such an action or decree is being considered. To the objection that decrees for custody of children are distinguishable from those for specific implement of contracts relating to things or deeds, the reply is that the subject-matter is immaterial: the defender's defying the court's authority is the element common to the various cases; and, as Lord President Strathclyde observed, impotence ill becomes a Court of Justice.<sup>27</sup>

Since the diligence used in *Ross* and *Edgar* was compared by counsel with that of the English courts,<sup>28</sup> it is instructive to note that *The Supreme Court Practice 1988*,<sup>29</sup> commenting on O. 46, r. 5, which concerns application for leave to issue writ of sequestration, states that this form of execution

is often used against the property of a body corporate or a director or officer of that body (see O. 45, r. 5(1)(i) and (ii) and see *Worthington v. Ad-Lib Club Ltd.* [1965] Ch. 236....).

Where the disobedience to the order of the Court is not obstinate and the breaches have been remedied, the Court may impose a fine in lieu of the sequestration of the assets of a company or corporate body, especially where such sequestration would adversely affect the livelihood of innocent parties (*Steiner Products Ltd. v. Willy Steiner Ltd.* [1966] 1 W.L.R. 968....).

Two examples of the use of sequestration to coerce the obedience of corporate bodies and their natural servants and agents are *Spokes v. Banbury Board of Health*<sup>30</sup> and *Phonographic Performance Ltd. v. Amusement Caterers (Peckham) Ltd.*<sup>31</sup> This form of execution is now directed at trades unions in England and Wales,<sup>32</sup> and played an important part during the miners' strike of 1984 to 1985.<sup>33</sup> If there are complaints that its effect is drastic and its use in such circumstances is controversial, one may reply in the words of an Australian judge. In *Australian Consolidated Press Ltd. v. Morgan and Another*,<sup>34</sup> Windeyer J., before explaining the nature and effect of a writ of sequestration,<sup>35</sup> referred to *Keogh v. The Australian Workers' Union*:<sup>36</sup>

Dealing with an application for sequestration of the property of a trade union that had disobeyed an injunction [Walker J.] said, "This is not an application by the plaintiff that the Court should exercise its criminal jurisdiction, and punish the union for a criminal offence; it is a step in the suit by which the plaintiff endeavours, by the only means open to him, to enforce against the union the injunction of the Court....

The point that the only means open to the otherwise successful pursuer against a corporate defender is sequestration justifies the issue of so drastic a compulsitor.

In *Benabo v. William Jay & Partners Ltd.*,<sup>37</sup> ordering a sequestration was held to fall within the court's discretion. The Scots cases of *Ross* and *Edgar* involved custody of children-- matters so serious that the advisability of sequestration could not be impugned in the particular circumstances. In the field of specific implement of contracts, the pursuer has a general right to specific relief, subject to the court's discretion, and it is for the defender to state convincing reasons against the decree. Re-examination of *Gall* allows us to distinguish two questions: whether the court *could* ordain specific implement against the corporate body; and whether the court *should* ordain specific implement against the corporate body. Adaptation of *Ross* and *Edgar* would have entitled the court to issue decree for the remedy; and subsequent defiance by the corporate body would have rendered it liable to sequestration and the appointment of a judicial factor to "freeze" its property and affairs until the members had agreed to Gall's reinstatement. Such interruption of all the members' dealings with and benefits from the friendly society (if necessary, throughout all the various branches) would have brought the desired obedience before too long: as a comparison, the miners' resistance cracked in 1985. Gall and the friendly society members were not in a close personal relationship such as marriage, employment, agency, or partnership; and in *Collins* the court was quite willing to grant declarator of membership and its consequent entitlements. But declarator differs from the far more severe diligence of sequestration, and the court, had it been faced with a petition for the latter, might have considered that ordaining sequestration and the appointment of a judicial factor would result in such a disturbance of the existing arrangements and such a degree of resulting hostility by the members towards Gall that specific implement should, in the exercise of judicial discretion, be refused. Everything would depend on the particular facts, though; and the weapon of sequestration would go a long way to ensure that a claim for specific implement against a corporate body would not be automatically barred, no matter how good the pursuer's claim and how bad the defender's behaviour. To hold otherwise would be to concede that a potential defender to an action *ad factum praestandum* may afford himself a complete defence by turning himself into a one-man company. And it would be strange if the primary remedy for breach of contract in Scotland should not be available against a corporate body, an organization so important a feature of modern life.

*Gall* and *Lochgelly Iron & Coal Co. Ltd.* were relied on by Sheriff Layden in *Ford v. Bell Chandler* when he refused to ordain implement against a company with a

Venezuela registration and place of business in Great Yarmouth.<sup>38</sup> On appeal, Sheriff Principal Gimson noted that section 1(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 confirmed the compulsoriness of imprisonment; and also pointed out section 1(2), whereby the court may "make an order for the payment by the respondent to the applicant of a specified sum or make such other order as appears to the court to be just and equitable in the circumstances...."; an addition which he thought removed the lack of jurisdiction over a foreign defender. "Discussions of the limitations on such actions prior to 1940 are of little assistance in considering the position since then."<sup>39</sup> *Ford* was alluded to by the Extra Division in *Grosvenor Developments (Scotland) plc v. Argyll Stores Ltd.*,<sup>40</sup> when Lord Allanbridge was discussing the respondents' fourth plea why interdict should be refused: that the respondents, being corporate, could not be imprisoned, so decree for specific implement or interdict would be unenforceable. "However, as pointed out in McBryde on *Contract* (1987), at p. 514, it may be that s. 1(2) of the [1940 Act], which gives the court increased powers to impose a monetary penalty in lieu of imprisonment, removes this problem of enforceability in the case of a corporate body."<sup>41</sup> Would that Lord Allanbridge had grasped the nettle, rather than preferring "to decide the question of competency on grounds other than those of enforceability against a corporate body";<sup>41</sup> for the respondents, though successful on other grounds, were entitled to feel that their fourth objection was, on the basis of *Gall*, decisive in the absence of contrary argument by the appellants. McBryde's interpretation of section 1(2) is sound as regards actions for specific implement to be raised against foreign defenders, whether natural or juristic persons. The court's power to order payment of a sum gets it over the hurdle of arrestment *ad fundandam jurisdictionem*.<sup>42</sup> But as regards a corporate defender registered in Scotland and thus amenable to the local courts' jurisdiction, the snag of McBryde's interpretation is that a specified sum, unless quite stiff, may be mere bagatelle to a company, no genuine coercion at all, so that the defender is in effect given the option whether to perform specifically or by money equivalent. Section 1(2) provides for the making of "such order as appears to the court to be just and equitable in the circumstances", without specifying that this cannot take the form of sequestration and factory; and the person who is claiming specific implement could therefore apply for the making of an order which would give so drastic a coercive warning to the company that the application itself might have the desired effect, and the order might never have to be imposed.

Notes

1. (3 & 4 Geo. 6 c. 42).
2. GLOAG, CONTRACT 659.
3. 1900, 2 F. 1187 (2d Div.).
4. (59 & 60 Vict. c. 25).
5. *Gall*, 2 F., 1191.
6. 1913, 1 S.L.T. 405, 414 (H.L.).
7. 1915 S.C. 190 (1st Div.).
8. *Id.*, 193-4.
9. *Cf.*, *Whyte v. Whyte* 1913 2 S.L.T. (O.H.) 85.
10. GLOAG, CONTRACT 660 n. 1.
11. 1889, 16 R. 753 (1st Div.).
12. *Id.*, 754.
13. *Id.*, 757.
14. 1860, 22 D. 665 (2d Div.); *infra* chapter 10.
15. Quoted in HAHLO'S CASEBOOK ON COMPANY LAW 45 (2d ed., 1977).
16. 1885, 12 R. 1351 (1st Div.). Professor Black kindly showed me *Ross* and *Edgar*; for the latter, *see* N.M.L. WALKER, JUDICIAL FACTORS 12, 61 (1974).
17. *Ross*, 12 R., 1354-5.
18. *Id.*, 1354; 1 ROSS, LECTURES 234; ERSKINE, INST. 1.1.8.
19. *Ross*, 12 R. 1355; 1 [E.B.] DANIELL'S CHANCERY PRACTICE 912 (6th ed., 1882), and *Miller v. Miller* (1870) L.R. 2 P.D. 54 (restitution of conjugal rights by wife out of the English court's jurisdiction).
20. *Ross*, 12 R., 1355.
21. *Id.*, 1356.
22. 1893, 21 R. 59 (1st Div.).
23. *Id.*, 60.
24. *Id.*, 61.
25. *Fisher v. Edgar*, 1894, 21 R. 1076 (1st Div.).
26. 21 R., 61; 1080.
27. *Collins*, 1915 S.C., 193-4.
28. The chancery courts introduced sequestration as a means of compelling contumacious defendants determined to endure the rigours of imprisonment: ASHBURNER, EQUITY 31. For the modern law of sequestration in the English and kindred legal systems, *see*, 17 HALSBURY'S LAWS OF ENGLAND paras. 505-16; G. BORRIE & N. LOWE, LAW OF CONTEMPT 429-37 (2d ed., 1983); SHARPE, INJUNCTIONS AND SPECIFIC PERFORMANCE 255-6, 260-1; SPRY, EQUITABLE REMEDIES 355; C.J. MILLER, CONTEMPT OF COURT 446-52 (2d ed., 1989).
29. 1 THE SUPREME COURT PRACTICE 1988 717 (1987).
30. (1865) L.R. 1 Eq. 42.
31. [1964] Ch. 195; SPRY, EQUITABLE REMEDIES 355.

32. MILLER, CONTEMPT OF COURT 447.
33. *Id.*, 420-2.
34. (1964) 112 C.L.R. 483 (H.C.).
35. *Id.*, 498-9.
36. (1902) 2 S.R.Eq. (N.S.W.) 265, 282; *Morgan*, 112 C.L.R., 498.
37. [1941] Ch. 52.
38. 1977 S.L.T. (Sh. Ct.) 90.
39. *Id.*, 91.
40. 1987 S.L.T. 738 (Ex. Div.).
41. *Id.*, 742 G.
42. *See infra*, chapter 12.

## PART III

## Chapter 6: The Sale of Goods: the problem stated

As regards the specific enforcement of contracts for the sale of corporeal moveables in Scotland today, one school of thought maintains that the remedy is fully competent, limited only by the recognized defences which prevail in all the other kinds of contract. The opposite school insists that specific implement of the sale of corporeal moveables is limited to those which are specific or ascertained and which also possess a *pretium affectionis* distinguishing them from others of the same class. From this rule flows the corollary that those corporeal moveables which are not specific or ascertained and which lack a *pretium affectionis* are beyond the scope of the remedy: using the damages obtained from the seller who refuses to carry out the terms of his contract, the buyer must go into the market and purchase a substitute. In deciding which of these conflicting views prevails, it will be convenient to take the terms, clauses, and subsections of the governing statute and thence discuss the case law and juristic writing, Scots and English, which surround them. Where appropriate, the authorities of other systems will be included for discussion.

The statute which governs the sale of corporeal moveables is the Sale of Goods Act 1979,<sup>1</sup> which replaced the Sale of Goods Act 1893.<sup>2</sup> Specific performance is provided for in section 52 of both.

### The application of section 52 of the Sale of Goods Acts 1893 and 1979 to Scotland

Subsection (4) states that the provisions of the section "shall be deemed" to supplement the right of specific implement in Scotland. The word "deemed" appears eleven times in the 1979 Act-- in sections 32(1); 34(1); 35(1); 45(1), (4), (6); 52(4); 57(1); 61(2), (3), (4)-- but section 52(4) is the only one in which the subject of the word is the provisions of a section of the Act: in the others the subject is "delivery" (sections 32(1); 34(1); 35(1)) or "goods" (section 45(1) or "transit" (45(4)), (6)) or "lot" (57(1)) or "breach of warranty" (61(2)) or "thing" (61(3)) or "person" (61(4)). Section 52(4)'s is thus a kind of deeming clause different from those of the other sections, and, in the determination of its meaning, little help, probably, is to be derived from a study of the meaning of "deemed" elsewhere in the Act. As to the possible meaning, Gowers<sup>3</sup> notes that its technical sense signifies "the constructive or inferential as opposed to the explicit or actual" and Fowler<sup>4</sup> observes that it is "an indispensable word in its legal sense of assuming something to be a fact which may or may not be so." Both condemn its use as a stilted synonym for "think." An important juridical statement of its operation was

made by Lord Radcliffe in *St Aubyn and Others v. Attorney-General*:<sup>5</sup>

The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive definition that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.

To these Wilson<sup>6</sup> adds the usage where it brings about a legal effect: in section 16(1) of the Hire Purchase Act 1965,<sup>7</sup> for example, the dealer is deemed to be the agent of the seller. Perhaps Wilson's usage may meld with Lord Radcliffe's third: in section 61(2) of the Sale of Goods Act 1979-- "... a breach of warranty shall be deemed to be a failure to perform a material part of the contract"-- "deemed" does the work of making the breach the equivalent of the failure, so that the two legal results can be cast into the relation "X. is Y." Section 61(2) is a definition for the purposes of the Act and appears in the section headed "Interpretation." Test this assertion by removing the words "be deemed to": "... a breach of warranty shall be a failure to perform a material part of the contract". We can go on to say that by bringing the breach into a relation of equivalence with the failure, "deemed" brings about a legal effect. Nevertheless, the capacity of "deemed" to bring about a legal effect is increased if the word is aided by some verb or adjectival phrase which denotes action. Examples would be "to include", "to exclude", and "to be in addition to".

We apply the possible usages to section 52(4). Lord Radcliffe's first is here irrelevant. It is inconceivable that "The provisions of this section" is a word or phrase on which there can be imposed for the purposes of the Sale of Goods Act an artificial construction that would not otherwise prevail: the phrase is synonymous neither with the marginal note, "Specific performance," nor with the clause "shall be performed specifically" in subsection (1), but with the whole of subsections (1) to (3). As regards his second usage, does "deemed" here put beyond doubt the uncertainty whether the provisions of section 52 are in fact supplementary to, and not in derogation of, the right of specific implement? A positive response would rest upon one of two assumptions. The first would be that, as an English county court judge, the draftsman, Chalmers, was unsure whether the Act would supplement and not derogate from the right of specific implement, and therefore, just in case the scope of the remedy at Scots common law should turn out to be narrower than that of the statutory remedy, he stilled the doubt by providing that the section is to expand the scope of the remedy at Scots common law.



The second assumption would be that the doubt beset not only Chalmers but also the lawyers of Scotland. The force of the first conjecture is sapped by Chalmers's commentary on section 52. In a paragraph which has percolated down through eighteen editions of *Chalmers' Sale of Goods Act* he says: "In Scotland specific performance, or, as it is called, specific implement, is an ordinary remedy and not an extraordinary remedy, and it can be demanded as of right wherever it is practicable."<sup>8</sup> Footnote (g) now refers to *Stewart v. Kennedy*<sup>9</sup> and *The S. S. Elorrio*,<sup>10</sup> the latter being cited as authority that the court has a discretion. The draftsman was at least well aware of the general rule as expounded in *Stewart*. If, as seems likely, he thought that it applied to the sale of goods, the purpose of section 52(4) would have been to confirm the common law of Scotland. In the introduction to the first edition of his book on the Act Chalmers said: "As regards Scotland, in some cases the rule has been saved or enacted for Scotland, in others it has been modified, while in others the English rule has been adopted. These points are noted under the sections as they arise."<sup>11</sup> His note on section 52(4) leads one to believe that the Scots rule was saved or enacted for Scotland, or modified so that its scope would be enlarged but not contracted. This impression is refined by the commentary on section 52 which was written by one of the two Scots lawyers who, in Chalmers's encomium, "took an infinity of pains to suggest the necessary amendments"<sup>12</sup> for extending the terms of the Sale of Goods Bill 1890 to Scotland. R. Brown<sup>13</sup> reveals not a glimmer of the possibility that the common-law right of specific implement was to be restricted or supplanted by the Act. Neither does he mention the decisions<sup>14</sup> put forward by those who limit the remedy to goods specific or ascertained and unavailable in the market. He either overlooked those cases or, considering that they misconceived the proper law of Scotland, he advised that the wording of the Act should not confine specific implement within their boundaries. Either way, in his commentary he gives no hint of being nagged by the doubt which forms the content of the second assumption.

We pass to Lord Radcliffe's third usage. A clause such as "The provisions of this section shall be deemed to be the right of specific implement in Scotland" is awkward and remains so even if "equivalent to" is inserted between "be" and "the." In section 52(4), therefore, "deemed" does not introduce a definition. But add the adjectival phrases "be supplementary to, and not in derogation of," which denote actions, and there arises the kind of deeming clause remarked by Wilson, that which brings about a legal effect. Section 52 supplements the law of Scotland. "Deemed" throws a bridge from the statute over to the common law, and "supplementary to" in that subsection,

"action" in subsection (1), and "decree" in subsections (1) to (3) serve as brace, arch and support.

The contention that "supplementary" braces the link between the statute and the common law is best advanced by a review of the meanings of the word in a dictionary. The *Oxford English Dictionary*<sup>15</sup> gives: "Of the nature of, forming, or serving as, a supplement." The list of technical uses includes three particularly relevant to Scotland, the first two illustrated by quotations from G.J. Bell's *Commentaries*<sup>16</sup> and the last by a quotation from W. Bell's *Dictionary*:<sup>17</sup> supplementary deeds or acts in conveyancing; supplementary sequestration; and the supplementary summons. Turn back a page<sup>18</sup> to look at "supplement" as a noun. Sense 1 is "Something added to supply a deficiency; an addition to anything by which its defects are supplied; an auxiliary means, an aid...." Special senses under this head are the part added to a written document, and various mathematical terms.<sup>19</sup> Sense 2 is "The action of supplying what is wanting; the making good of a deficiency or shortcoming." In the *Register of the Privy Council of Scotland* (1591)<sup>20</sup> stand the words "Ane new gift of the saidis landis grantit with all dew solempnriteis and with supplement of all faultis." Sixty-one years later, in *Elements of Power and Subjection*,<sup>21</sup> R. Coke writes "Equity is ... either a remission or moderation of the Laws ... or ... a supplement of the Law in cases wherein things in conscience ought to be done." The special meanings under sense 2 are terms of Scots law:<sup>19</sup> letters (or writ) of supplement and the oath in supplement, explained by Stair,<sup>22</sup> Erskine,<sup>23</sup> and the Bells.<sup>24,25</sup> Tracing the etymology of "supplement," we find that the English noun comes from the Latin noun "supplementum," itself a derivative from the verb "supplere."<sup>26</sup> The verb was compounded of the prefix "sub" and the verb "plere," "to fill," and literally meant "to fill up from below," hence "to fill up," hence "to supply."<sup>27</sup> The meanings of "supplementum" as "Something added to supply a deficiency or make up a whole,"<sup>28</sup> and of "supplere" as "To make (a receptacle) full with additional supplies of liquid, etc."<sup>28</sup> are substantiated by a passage from the *Attic Nights* of Aulus Gellius.<sup>29</sup> Their friend Favorinus being arbiter, a Stoic and a Peripatetic debate how far virtue avails in determining a happy life. The latter tries to trip his opponent by inquiring whether an amphora (holding roughly six gallons) of wine from which a congius (about six pints) has been taken is still an amphora. "No," replies the Stoic. "Well then," says the Peripatetic, "it will have to be said that a congius makes an amphora, for without it there is no amphora and when it is added there is an amphora. But if it is absurd to say that an amphora is made by a single congius, it is equally absurd to say that life is made happy by virtue alone, since, when virtue is absent, life

can never be happy." Favorinus condemns this as a captious ruse rather than an honest argument, saying:

Congius enim, cum deest, efficit quidem ne sit iustae mensurae amphora; sed cum accedit et additur, non ille unus facit amphoram, sed supplet. Virtus autem, ut isti [i.e., the Stoics] dicunt, non accessio neque supplementum, sed sola ipsa vitae beatae instar est et propterea beatam vitam sola una, cum adest, facit.

One of the special meanings of "supplere" given by the *Oxford Latin Dictionary*<sup>28</sup> is "to complete, supplement (an undefined literary work, etc)." Papinian<sup>30</sup> is quoted: "Ius praetorium est, quod praetores introduxerunt ... supplendi vel corrigendi iuris civilis gratia." This review of the meanings of "supplementary," "supplement," "supplementum," and "supplere" therefore strengthens the argument that subsections (1) to (3) act upon the right of specific implement.

The arch of the connexion between the statute and the common law is "action." This word includes condescendence and claim and compensation-- Scots terms all.<sup>31</sup>

The support is "decree." Here the history of the section is illuminating. The Sale of Goods Bill 1890 in its original form did not extend to Scotland.<sup>32</sup> Part IV comprised the remedies for breach of contract: the seller's action for the price (clause 51) or damages for non-acceptance (52), the buyer's action for non-delivery (53) or for trover or detinue (54) or for specific performance (55) or for breach of warranty of quality, fitness, or condition (56); and there was also a clause about interest and special damages (57). Clause 55 ran:<sup>33</sup>

In any action for breach of contract to deliver specific goods for a price in money, on the application of the plaintiff and by leave of the judge before whom the action is tried, the jury shall, if they find the plaintiff entitled to recover, find by their verdict (or if there be no jury then the judge shall find) what are the goods in respect of the non-delivery of which the plaintiff is entitled to recover and which remain undelivered; what, if any, is the sum which the plaintiff would have been liable to pay for the delivery thereof; what damages, if any, the plaintiff would have sustained if the goods should be delivered under execution as hereinafter mentioned; and what damages if not so delivered; and thereupon if judgment shall be given for the plaintiff, the judge in his discretion, on the application of the plaintiff, shall have power to order execution to issue for the delivery, on payment of such sum if any as shall have been found to be payable by the plaintiff as aforesaid, of the said goods without giving the defendant the option of retaining the same upon paying the damages assessed.

For the purposes of this section "plaintiff" includes a defendant who counterclaims for delivery of the goods.

The substructure of the clause was section 2 of the Mercantile Law Amendment Act 1856,<sup>34</sup> its superstructure the changes introduced into the administration of justice by the Supreme Court of Judicature Acts 1873-5 and the Rules of Court.<sup>35</sup> "Decree" finds no place in the Mercantile Law Amendment Act or the Sale of Goods Bill. Chalmers points out that "it is the Scotch term for judgment,"<sup>36</sup> *Benjamin on Sale*<sup>37</sup> is to like effect, and Brown is pellucid when, drawing upon his experience as an adviser to the draftsman, he tells us, "The word was introduced in adapting the bill to Scotland."<sup>38</sup>

### **The Background to Section 2 of the Mercantile Law Amendment Act 1856<sup>39</sup>**

The main influence upon the enactment of section 2 was the recommendations contained in the Second Report of the Mercantile Law Commission 1855.<sup>40</sup> The commissioners, among whom were Scots, conducted an exercise in comparative law by taking cognizance of the buyer's right of specific implement before they suggested that, because section 78 of the Common Law Procedure Act 1854<sup>41</sup> was not wholly satisfactory, English and Irish law should be altered so as to conform with Scots law. The significance of this appears if we look past section 78 and all the way back in English legal history to the old personal actions. Afterwards we may even be able to suggest why the adjectives "specific or ascertained" were included in section 52 of the 1893 Act and what role they play. The old actions which we examine are debt and detinue, as well as trover. The third came in order to supplement the weakness of the second and stayed to eclipse it. For an understanding of their operation, the civilian must sketch for himself the administration of justice in those far-off days, and so something must first be said about the structure of the courts and their jurisdiction, the system of writs, and the modes of proof.

The courts and the administrative units of the thirteenth century are outlined by Pollock and Maitland as follows:<sup>42</sup>

For the purpose of temporal justice England is divided into counties; the county is divided into hundreds; the hundred is divided into vills or townships [the learned authors adding in note 2, "This is not strictly true, for the vill may extend into two or three hundreds and into two counties...."]. The county has a court, the hundred has a court, the vill or township as such, has no court; but the vill is an important unit in the administration of the law. Again, the vill is very often coincidental with a manor and the manor has a court.

The president of the county court is the King's man, the sheriff; of the hundred court, likewise the sheriff or his bailiff; and the freeholders attend as judges.<sup>43</sup> In a hundred

held by a lord the court is run by his steward.<sup>43</sup> The sheriff goes the rounds of all the hundred in the county twice a year.<sup>44</sup>

Over against these "communal courts"<sup>45</sup> are the seignorial courts. Through feudal office each lord sits in a civil court composed of his freeholders, there to decide their personal actions and those real actions started by the King's writ of right.<sup>46</sup> His jurisdiction over his unfree tenants extends more widely. Later the court of and for the free would be termed the court baron; that for the unfree, the customary court.<sup>46</sup> Besides this jurisdiction which he exercises by virtue of his status, the lord may have conferred upon him by the King additional franchises, liberties, royalties, powers, and immunities of varying content, ranging from the franchise of the view of frankpledge and the minor criminal jurisdiction, through to the franchise granted a palatinate earl.<sup>47</sup> Independent boroughs enjoy their own privileges.<sup>48</sup>

Superior to all these local courts is the *Curia Regis*, which in the course of time separates into the Exchequer, the Common Bench, and the King's Bench.<sup>48</sup> In this order each court finds a home in Westminster Hall.<sup>49</sup> Together they build up the common law. In the twelfth century the Exchequer is set up as an independent department to watch over the finances of the state;<sup>50</sup> by the second half of the thirteenth century it hears revenue cases mainly.<sup>51</sup> The King's Bench travels round with the King and hears pleas of the crown, but comes to rest at Westminster by the fourteenth century.<sup>52</sup> The Common Bench hears matters not involving the King, suits between his subjects; and for our purposes it is of the three common-law courts the salient because it has exclusive power to decide actions of debt and detinue.<sup>53</sup> The court structure reviewed, we move on to discuss the limits of jurisdiction.

Not all personal actions reached the King's courts. The courts of the hundred and the county and the court baron all heard actions of debt and detinue;<sup>54</sup> and by local custom a matter did not go as far as the King's courts unless the sum of money or the value of the chattel claimed exceeded forty shillings. Pollock and Maitland<sup>55</sup> and Holdsworth<sup>56</sup> thought that this restriction might have stemmed from the juridical interpretation placed upon the Statute of Gloucester (1278).<sup>57</sup> That Act prevented claims in trespass (a writ and an action separate from debt and detinue) from being brought in the royal courts unless the forty-shillings requirement was met. Pollock and Maitland<sup>58</sup> went on to point out that the limit had applied very much earlier than 1278, for the Irish Register of Writs in the reign of King John (1227), when it directs the sheriff to hear an action of debt, mentions that if the debt is for less than forty shillings the plaintiff need not pay the King a proportion of the sum recovered, whereas for

amounts in excess thereof he has to give security for paying the King a third of the sum to be recovered. The royal writ is therefore granted only in respect of those debts from which a large part would find its way into the treasury. So far as the writ of debt-detinue is concerned, Pollock and Maitland's opinion is endorsed by Beckerman,<sup>59</sup> who nevertheless disagrees with them about the interpretation of the statute. A writ being unnecessary in the local courts, Beckerman<sup>60</sup> adds that the plaintiff would prefer to start his action there unless it was sufficiently valuable to make the purchase of a writ and the giving of security practicable. In the local court he just made his plaint.<sup>61</sup>

If his action met the forty-shillings requirement and he desired to bring the King's authority to bear not only on the defendant but also, perhaps, upon a dilatory sheriff, he bought a writ drawn by the clerks in the chancery.<sup>62</sup> Its addressee, the sheriff, was instructed to take legal steps against the defendant; and a report on those was to be remitted to Westminster.<sup>62</sup> Writs were penned in many different forms but the family with which we are concerned is the *Praecipe*, so called from the Latin command that the sheriff shall order the defendant to do right as required by the writ's terms, or else to come and explain to the justices why he, the defendant, had not done so.<sup>63</sup> The basic pattern was the writ of right for land, and thence arose, with the necessary modifications, the writ of debt.<sup>64</sup> In its early form recorded by Glanvill, the latter read:<sup>65</sup>

Rex vicecomiti salutem. Praecipe N. / quod iuste et sine dilatione reddat. R. centum marcas quas ei debet ut dicit, et unde queritur quod ipse ei iniuste deforciat. Et nisi fecerit, sumone [sic] eum per bonos sumonitores [sic] quod sit coram me vel iusticiis meis apud Westmonasterium a clauso Pascha in quindecim dies, ostensurus quare non fecerit. Et habeas ibi summonitores et hoc breve. Teste etc.

Further changes in the wording will be discussed below. Like all *Praecipe* writs, that of debt purposed the upholding of the plaintiff's right: if the defendant obeyed the sheriff, the matter was not litigated.<sup>66</sup> Holdsworth therefore compares the *Praecipe* writ with the Roman interdict.<sup>67</sup>

Suppose that the plaintiff brings his plaint in the local courts. There from Anglo-Saxon times the local customs obtain. To call the proceedings a trial would be anachronistic, because it is only from the thirteenth century onwards that this word, derived from the French verb *trier*, appears in the law books, and when it does it is then mainly in relation to the challenging of jurors.<sup>68</sup> Instead we speak about the modes of proof-- ordeal and the one relevant to debt and detinue, oath.<sup>69</sup> First, the plaintiff's:

when the parties enter court he swears to the good faith of his claim; he formally acknowledges its particulars; he gives pledges for the due prosecution of his suit; and he backs his claim with a sufficient *secta* or other evidence.<sup>70</sup> The *secta* is a group of witnesses swearing that they believe his cause to be genuine; they do not establish it except when there is strong circumstantial evidence as well; and after the trial by jury is inaugurated, production of the suit declines into an empty formality recited in the pleadings until 1852.<sup>71</sup> The suitors must number at least two (*Testis unus, testis nullus*) and may number as many as thirteen.<sup>72</sup>

Over to the defendant: he swears that the plaintiff's claim is false. (In the developed system of pleadings, this flat denial, in Saxon the *thwert-ut-nay*, subsists as a preface to whatever defences he may raise.<sup>73</sup>) He also agrees to abide by the result of the proof. The court then decides which particular mode of proof will be discharged by which party.<sup>74</sup> Successful discharge gives victory to that party; failure bestows it upon his opponent; and the court's final judgment follows the outcome.<sup>75</sup>

The mode of proof associated with debt and detinue is wager of law, compurgation.<sup>76</sup> Frequent among the barbarian tribes-- the Salians, Ripuarians, Alamanni, Baioarians, Lombards, Frisians, Norsemen, Saxons, Angli, Werini, the Anglo-Saxons, and the Welsh--<sup>77</sup> it is accepted as valid by the church.<sup>78</sup> When selecting it as the mode to be discharged by the defendant, the court decides the number of compurgators, the manorial courts usually requiring six,<sup>79</sup> and the author of *Fleta* giving it as his opinion that the compurgators should outnumber those in the plaintiff's *secta* twofold.<sup>80</sup> The number, says Holdsworth,<sup>81</sup> was in 1342 settled as twelve. He refers us to the Year Book 16 Edward III;<sup>82</sup> *Coke on Littleton*;<sup>83</sup> and Blackstone's *Commentaries*.<sup>84</sup> The Year Book does say in a marginal note that "xij requiruntur"; but it is clear from Coke and Blackstone that this means the total number on the defendant's side who took the oath. Coke says: "But he ought to bring with him eleven persons of his neighbours that will avow upon his oath, that in their consciences he saith truth, so as he himselfe must be sworne *De fidelitate*, and the eleven *De credulitate*." So the compurgators number eleven.<sup>85</sup> The defendant in set form takes an oath denying the plaintiff's charge, then attempts to muster the required number. Even if he does, he must pronounce his oath accurately, for the least slip "bursts" that of the defendant.<sup>86</sup> By the old form of compurgation all had to swear the same oath as the defendant and all were similarly liable to punishment for perjury.<sup>87</sup> The later form merely requires of each compurgator an oath that he believes the defendant's oath to be true;<sup>88</sup> whereas his oath formerly concerned the defendant's liability it now relates to his credibility.

Moreover, the sanction for perjury having been removed, the temptation entices more strongly.<sup>89</sup> Respect for compurgation wanes and its use is restricted: it can only be used by the defendant,<sup>90</sup> while alive, to prove his own acts.<sup>91</sup> It is disallowed in matters involving the crown (criminal and Exchequer matters);<sup>92</sup> contempt, trespass, deceit, and forcible injury;<sup>93</sup> debts brought on a deed<sup>94</sup> or for services which it is the plaintiff's legal duty to provide<sup>95</sup> or for a statutory penalty arising from a wrong.<sup>96</sup> At first it is also excluded if in a dispute between the original parties the facts are notorious--<sup>97</sup> Bereford C.J. asseverating, "God forbid that he should get to his law about a matter of which the county may have knowledge; for then with a dozen or half-a-dozen ruffians he might swear an honest man out of his goods"--<sup>98</sup> but after *Thornhill's Case*<sup>99</sup> and *Manston's Case*<sup>100</sup> this particular restriction is lifted.

Lawyers today, particularly the sceptical sophisticate who with condescension regards law wager as a practice antiquated and silly, are hindered in their attempts at gauging correctly the opinion which most people held of it in medieval times. A vivid imagination of the hell-fire which they were confident would sear perjurers would have caused many Christians to refuse a request to back the oath of a neighbour whom they knew from personal experience to be shifty; such a man would have found it hard to marshal the required number.<sup>101</sup> The usefulness of the custom was reduced, however, when a dispute was removed out of the community and heard in the royal courts at Westminster. There it was fiction later played out by hireling witnesses, so-called knights of the post.<sup>102</sup> "The neighbours could not be dragged to Westminster ... and compurgators were hired on the spot."<sup>103</sup> Unlike jurymen, they could not be legally compelled to attend court on the day appointed.<sup>104</sup> Some people were not too averse to the practice: the Londoners, for example, secured the Statute 38 Edward III (1364), statute 1, chapter 5, which preserved it as a defence to debts evidenced by a merchant's books.<sup>105</sup> Other people sought to oust it,<sup>106</sup> and Maitland told his students that a very long chapter in the history of the forms of action might be entitled "Dodges to evade Wager of Law".<sup>107</sup> When the system of pleading was raised to flights of medieval logic, and in the course of working towards the formulation of an issue for the jury's decision, the plaintiff's countor having stated his claim in the *conte* (the French for story, the Latin being *narratio* and the English *tale*),<sup>108</sup> the defendant's pleader could raise either a general traverse (denying every fact of the claim), or a special traverse (denying one material fact), or a confession and avoidance (admitting the facts of the claim and adducing others to explain them away).<sup>109</sup> Successor to the *thwert-ut-nay*, the general traverse, or plea of the general issue, provided the means of forcing law wager. Though



less frequent in later years, wager yet remained as a potential obstacle to the plaintiff's claim.<sup>110</sup> Its last recorded use was in 1824, in *King v. Wallace*.<sup>111</sup> It was removed from English law by the Civil Procedure Act 1833.<sup>112</sup>

Our introductory survey is ended, and we now proceed to the personal actions.

### The Action of Debt

The first essential to grasp is that in the heyday of the old actions the word "contract" bore a narrower meaning than it does in modern English law. Now it means a legally binding agreement; then it meant a transaction which transferred property or gave rise to a debt.<sup>113</sup> A rough analogy may be made with the Roman contracts *re*.<sup>114</sup> The idea of the legally binding agreement was in the common law of the thirteenth century expressed by the word "covenant" (from the Latin *conventio*).<sup>115</sup>

The nature of the action of debt we see by translating the words of the writ recorded by Glanvill: "Command N. to render to R., justly and without delay, one hundred marks which he alleges that he owes him and which, he complains, he is unjustifiably withholding from him."<sup>116</sup> "Deforciat," proper to the real action concerning land held in chief,<sup>117</sup> discloses the writ's parentage, the writ of right (*Praeceptum in capite*).<sup>118</sup> "The bold crudity of archaic thought equates the repayment of an equivalent sum of money to the restitution of specific land or goods,"<sup>119</sup> and *mutuum* and *commodatum* are conflated.<sup>119</sup> But when the offer of trial by battle as a proof of debt disappears, in the royal though not in the local courts "deforciat" gives way to "debet," and *unde* vanishes.<sup>120</sup> The writ is further refined. The chancery clerk puts in "debet et detinet" if the original parties are arguing over a demand for money. For all other matters he uses "detinet": the demandant of money from the executors of the deceased defendant, the buyer of unascertained barley, the obligee requiring payment in barley according to the terms of the obligation stated in a written deed-- these people claim by a writ in the *detinet*.<sup>121</sup> The writ suffered no further changes, and the clerks went on issuing the two standard forms. But upon the language the lawyers subsequently erected the rule that if the barley was specific then the action was *detinue*, and if it was unspecific then the action was debt in the *detinet*.<sup>122</sup> From the separate headings for debt and *detinue* in Fitzherbert's *New Natura Brevium*,<sup>123</sup> a commentary on the *Register of Writs*,<sup>124</sup> Milsom<sup>125</sup> infers that the jurists had begun to distinguish the two actions and were enabled to do so by the institution of the jury trial and the changes in the lawyers' arguments before the courts: in the royal courts the defendant could now bring his own facts to the attention of the judge and jury.

### The Action of Detinue

Developing out of the action of debt, detinue assumed several forms: for example, detinue *sur bailment* (French for "on a bailment"); detinue on a sale of goods; detinue against a stranger (detinue *devenit ad manus defendantis* ("it has come to the hands of the defendant")) and detinue *sur trover* ("on a finding"). These did not spring to life all together: first was detinue *sur bailment*, second came *devenit ad manus*, and detinue *sur trover* evolved as a count safer than the perilous *devenit*. Once again, the words of the writ indicate the nature of the action. In a writ of detinue for bonds, part of the command to the sheriff ran: "Praeceptum A. quod juste et sine dilatione reddat B. unam pixidem cum tribus scriptis obligatoriis in eadem pixidem contentis sub sigillo praedicti B. consignatis, quam ei injuste detinet, ut dicit": "Command A. that justly and without delay he render to B. the one box with three writings obligatory signed under the seal of the aforesaid B., contained in the same box, which he unjustly detains from him, as he says."<sup>126</sup> Detinue therefore lay to enforce the right to possession where the claimant lacked actual possession.<sup>127</sup>

### Detinue Sur Bailment<sup>128</sup>

What is bailment? English law in the time of which we speak did not countenance the Roman *dominium*. The main right in a chattel was "property," enjoyed during the occupation of the chattel, and transferred by delivery. The lesser right was mere possession. A person might hand over his chattel to someone else with one of two intentions: either that his whole property therein should pass to the other, as in sale or gift; or that it should stay with him. The second kind of transaction was bailment (from the French *bailler*, "to deliver") and its forms were loan for use, hire, deposit, and pledge.

Should the bailee fail to restore the chattel, the bailor used the action of detinue *sur bailment* for its return. He failed if, through no fault of the bailee, return was rendered impossible by the accidental loss or destruction of the thing. After the fifteenth century, however, stricter rules only excused the bailee if the loss resulted from an act of God or of the King's enemies or was such that under the terms of the bailment he was not liable for it. Naturally the defendant would in other cases resort to compurgation by replying *non detinet*.<sup>129</sup> Where, say, he had drunk up bailed wine with several good fellows (*bons compagnons*)<sup>130</sup> or had sold it, he did not technically detain it at the time when the plaintiff sued. Successfully waging his law, though he damned himself by telling less than the whole truth he defeated the action of detinue *sur bailment*

and left the plaintiff to sue for damages in trespass. The blank *non detinet* has also impeded legal historians searching for the facts of the matter and the rules being developed in the courts.<sup>131</sup>

### Detinue on the Sale of Goods

Sale was no bailment but it was still a voluntary transaction between the parties. We have alluded to the reasoning whereby the claim for unascertained goods was debt in the *detinet*, and that for specific goods was detinue.<sup>122</sup> Though debt and detinue both contained elements of obligation and property,<sup>132</sup> it is true to say that the property element later bulked larger in detinue. Holdsworth,<sup>133</sup> citing Brian C.J.,<sup>134</sup> says that the proprietary nature of detinue clearly appears from the year books, the action being thought of as one to assert the plaintiff's right to possession. In the seventeenth century the rule was firmly grounded by several cases. Thus in *Isaack v. Clark*,<sup>135</sup> about the conversion of a purse containing £22, Dodderidge J. held that the action of detinue implied property in the plaintiff and could be had by no other. He relied on the year book case already cited<sup>134</sup> and on Fitzherbert.<sup>136</sup> *Bishop v. Viscountess Montague*<sup>137</sup> was a split decision of the Common Pleas, the subject being conversion of five oxen. Anderson C.J. and Warberton J. in the course of their reasoning said that the plaintiff might "have detinue or replevin [another old personal action] for goods taken by trespass, which affirms always property in him at his election." And in *Kettle v. Bromsall*<sup>138</sup> the plaintiff sued to recover several things valued in all at £500, among them a knife handle with an old English inscription purporting to be a deed of gift to the monastery of St Albans, and a ring with an antique stone on which was raised in bas-relief the head of a Caesar. Delivering the court's judgment, Willes C.J. held that where lost things-- medals, pictures, or other pieces of antiquity-- could not be adequately assessed in damages for trover, the party seeking their recovery could only proceed in detinue.

Detinue was granted only for goods which were specific. So in *Isaack*,<sup>135</sup> Dodderidge J., again on Fitzherbert's authority,<sup>136</sup> decided that it would not lie for money delivered if the money were out of a bag, because the writ was aimed at recovering the thing itself, *in hoc individuo*, if possible; if impossible, then damages. The requirement was more fully stated by Blackstone:<sup>139</sup>

In this action of detinue it is necessary to ascertain the thing detained, in such manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn or the like: for that cannot be known

from other money or corn; unless it be in a bag or sack, for then it may be distinguishably marked.

Citing *Coke on Littleton*,<sup>140</sup> he gave the four requirements of the action, two of which were property in the plaintiff and the ascertainment of the goods in point of identity. That the goods must be specific was the crux of *Friedel v. Castlereagh*,<sup>141</sup> a decision of the Irish Common Pleas in 1877. A merchant tailor sued the Sheriff of County Down, alleging that under a writ of *fieri facias* he had negligently sold the plaintiff's stock-in-trade, valued at £1,500, for £45 13s. 6d. and still detained "a large quantity of stock in trade of the Plaintiff". Lawson J. delivered a short judgment that the law of detinue required the plaintiff to specify distinctly the nature of the goods sought to be recovered, and that if he were unable to do so, he must resort to other modes of gaining reparation.

For a case since the Sale of Goods Act 1893 to illustrate the two requirements which we have been discussing, we turn to *Laurie & Morewood v. Dudin & Sons*.<sup>142</sup> The defendant warehousemen held 618 quarters of maize in bulk belonging to J.T. Alcock & Sons. Alcock sold John Wilkes & Son 200 quarters of it for net cash and handed over a delivery order, which Wilkes indorsed with a request that the wheat should be held against its suborders. The order was taken to the defendants' wharf and its receipt entered in the books by the clerk, who made no comment thereon. Heavily indebted to the plaintiffs, Wilkes sold them the 200 quarters on credit and gave them a delivery order, which was also handed to the silent clerk, who did not enter it in the books. The plaintiffs asked the defendants for a warrant for the maize, but before their letter arrived, Alcock, unpaid, instructed the defendants to stop delivery. The goods were not appropriated to the contract. The plaintiffs sued in detinue. A strong Court of Appeal (Bankes, Warrington, Scrutton, L.JJ.) held that the transfer of the delivery order was not in itself sufficient to pass the property in the 200 quarters before that amount had been separated from the bulk. The court approved *Austen v. Craven*<sup>143</sup> and *White v. Wilks*,<sup>144</sup> in which Mansfield C.J. had delivered judgments on actions of trover. In *Austen* the fifty hogsheads of sugar contracted to be sold by the defendants to Kruse and by him to the plaintiffs were never separated, and because they were not specific, the plaintiffs failed. And in *White* a merchant had contracted to sell twenty tons of linseed oil from his stock stored in different cisterns in various warehouses, but as the precise cistern, warehouse, or oil went unmentioned, and the oil unseparated, the property in it remained with the seller. Scrutton L.J. held that *Whitehouse v. Frost*,<sup>145</sup> distinguished in *Austen* and *White*, and doubted by Benjamin<sup>146</sup> and Bell,<sup>147</sup> was now

overruled by section 16 of the 1893 Act: property in unascertained goods does not pass. The lord justice thus followed the approach of Lord President Dunedin in *Hayman & Son v. McLintock*<sup>148</sup> and quoted from that judgment. Laurie & Morewood's detinue action failed.

Under section 17 of the 1979 Act the property in the goods passes when the parties intend it to do so, and where their intention is unclear, section 18(1) lays down that on an unconditional sale of goods specific and in a deliverable state the property in them passes when the contract is made. Holdsworth<sup>149</sup> and Milsom<sup>150</sup> have different explanations of how this rule arose in English common law. Holdsworth says that in the thirteenth century the law required that for property to pass, the thing sold must be specific.<sup>151</sup> Once the seller had delivered he could sue in debt for the price. Until delivery, the buyer had to sue for the goods in debt in the *detinet*, because detinue was only available to the person with property. Neither party could sue on a wholly executory contract. Under Henry VI the old law was extended, so that the parties having agreed to buy and sell goods, the seller could sue in debt, and the buyer in detinue. As regards detinue, the extension consisted of allowing the action to someone who had not had possession of the goods before he sued: the right to possession became sufficient. This extension influenced and was itself influenced by that made to the action of debt.

Debt was divided into debt on an obligation and debt on a contract.<sup>152</sup> In the first, the legal duty was set down in a written deed under seal; in the second, it was not. The first endured until the nineteenth century in the conditioned bond, used to secure the performance of the duty, the obligor being expressly liable to pay a stated penalty if he should fail to discharge his duty.<sup>153</sup> The idea, in effect, was liquidated damages as a goad to due performance. This form of debt we leave behind in order to discuss the other, the debt on a contract. "Contract," we recall, meant a voluntary transaction, not a legally binding agreement.<sup>154</sup> The transaction here was the conferring, by one party upon the other, of a *quid pro quo*.<sup>155</sup> The recipient of this valuable recompense came under a duty to the grantor, from whose point of view the contract was executed and capable of being sued upon. In the thirteenth-century law of sale, the *quid pro quo* was the delivery of the thing sold. Then came the extension. Holdsworth says:<sup>156</sup>

As a general rule it is only performance by the plaintiff which will amount to a sufficient *quid pro quo*; but it is clear that a right to sue in detinue is almost as substantial a benefit as performance; and therefore a contract to sell which conferred such a right would be a *quid pro quo* for the right to sue in debt.

He refers to Ames<sup>157</sup> and *Veer v. York*.<sup>158</sup> Ames had said:

The right of the buyer to maintain detinue, and the corresponding right of the seller to sue in debt, were not conceived of by the medieval lawyers as arising from mutual promises, but as resulting from reciprocal grants,-- each party's grant of a right forming the *quid pro quo* for the corresponding duty of the other.

Veer was a frustrated priest who had undertaken the duty of a year's chanting for a deceased soul at the end of which he would be paid ten marks. Before the time expired he sued for half the money but his claim was rejected by the court. Against his case of service Choke J. put that of the purchase of a horse for twenty shillings: property in the animal having passed once the purchase was made, the seller was owed the price in full.

Hence it was but a step to the rule that the sale of goods passed the property from seller to buyer.<sup>159</sup> Attached to this, though, was the proviso that the goods must be specific:<sup>160</sup> as was confirmed in *Core's Case*,<sup>161</sup> the purchaser of unascertained barley, who might have an action of debt, could not have an action of detinue while one quarter remained undistinguishable from another.

Milsom's argument, supported by copious citations to the year books and plea rolls, may be summarized into the following bare propositions.<sup>162</sup> Holdsworth founds on the *a priori* assumption that specific goods were claimed in detinue, and unascertained goods were claimed in debt. But before the acceptance of the rule that sale passes property in specific goods, the buyer must always have had to claim goods, specific or otherwise, in debt in the *detinet*. To upset the premise is difficult, owing to the lack of clear evidence from the sources. *Ward's Case* (1356)<sup>163</sup> did state that "an action of detinue presupposes precedent property," but the writ *de rationabili parte bonorum*, which was in issue there, was exceptional and rather like debt. A note in 1310 mentioned a possible test (whether the writ specifies the goods or the claim is for chattels to a certain value), which did concern fungibles;<sup>164</sup> but it does not help us to work out how one claimed specific goods.<sup>165</sup> R. Thorpe's passing reference in 1347 to the buyer's action as detinue may have led to the idea that sale passes property.<sup>166</sup>

The plea rolls indicate that the device used to support the idea was constructive delivery. Two cases in Richard II's reign appear to have been buyer's actions for goods sold, and resemble detinue;<sup>167</sup> then from 1404 to 1468 there are, so far as Milsom's research had disclosed, no such cases; later, from 1481 and into the reign of Henry VII, they recommence.<sup>168</sup> Many of these later plaintiffs went further than a simple narration of the purchase and included two phrases normal in counts of bailment; the

first, that the goods were left with the seller *salvo custodienda*;<sup>169</sup> the second and less frequent, that they were to be *re-delivered* to the buyer. *Salvo custodienda*, though it might imply that the goods were specific, has also been found in a tort case where the goods were definitely not specific.<sup>170</sup> The buyer in a 1429 case seems to have counted on a bailment;<sup>171</sup> the year books reveal that the seller who retained possession after the contract was regarded as the buyer's bailee;<sup>172</sup> and so Milsom tentatively advances the theory that:<sup>173</sup>

Buyers in the fourteenth century used as action which was innocently called *detinue*; the property point at first raised an embarrassment which they eluded by counting on a bailment; and when the passing of property idea had thus been painlessly injected-- clear statements are found in 1442-3-- counts on sale reappeared, but at first often referring to a bailment. A possible reason for the return to honest counting is the problem raised by non-payment, clear appreciation of which is shown under Edward IV.

We pause to remark that Milsom does not invalidate Holdsworth's premise but offers a different explanation of the rise of the passing of property idea. The one argues that the extension made to *detinue* was a cause of the idea's acceptance; the other, that the idea attained respectability via bailment. Both agree that the idea was accepted. The outcome of the acceptance, indubitably, was that property passed on sale, and it is submitted that *Core's Case*<sup>174</sup> shows clearly enough that by the sixteenth century the buyer could sue in *detinue* if, but only if, the goods were specific. Milsom appears to have no difficulty with Holdsworth's premise in regard to the law *after* the passing of property idea was established.<sup>175</sup>

Bound up with the passing of property idea was the requirement that the price must be paid or arrangements entered into for its payment after the contract was made.<sup>176</sup> Simpson analyses Fortescue C.J.'s opinion in *Doige's Case*<sup>177</sup> that on a purchase of a horse the property is in the buyer, who has *detinue* for it while the seller has a writ of debt for the money.<sup>178</sup> The judge, he says, was merely contrasting sale of goods (on which reciprocal remedies were available to the parties) with sale of land (on which the buyer only acquired a right of possession when livery of seisin was made), and was not concerned with the questions when the sale of goods became binding and when it became actionable. Midway through the fifteenth century the seller, though he could dispense with averring payment when he claimed the goods, might still be answered with the seller's special plea that under the agreement the price was to be paid at the time of delivery.<sup>179</sup> Unless credit had expressly been agreed upon, the seller could keep the

goods until paid.<sup>180</sup> The judges split on the question of the contract's status. The orthodox Littleton and Choke JJ. in 1478<sup>181</sup> decided that since the property passed only upon payment, the tag "no *quid pro quo*, no contract" effectively prevented the creation of any contract until payment was made, and the seller could resile from the transaction.<sup>182</sup> They were stressing that the parties' intentions were paramount and, where unclear, had to be inferred from the parties' conduct.<sup>183</sup> By contrast, where earnest money was given or credit expressly given, the contract bound the parties immediately;<sup>184</sup> the property passed to the buyer, who could take the goods.<sup>185</sup> At the same time, the contract became actionable; the buyer could sue not only the seller in detinue and case, but also intermeddling strangers, possibly, in trespass. The proviso was that the goods should be specific, and until unascertained goods were delivered the buyer had to sue in debt. The orthodox theory prevailed in the fifteenth and sixteenth centuries.

The unorthodox theory was Brian C.J.'s.<sup>186</sup> In opposition to Littleton and Choke JJ., he held that, despite a lack of payment or arrangements<sup>187</sup> therefor, a sale was perfect. The residual rule was that the seller enjoyed a right of retention until paid or tendered payment, but could not sue for the price until he had delivered or tendered delivery. As the contract was perfect, property passed. The snag with Brian C.J.'s view was the meaning of "property." Normally it meant "the right to possession," but how could it be that if the seller enjoyed a right of retention? The judge was driven to analogy: the owner of bailed sheep could not take them back during the currency of the bailment.<sup>188</sup> Simpson comments tellingly:<sup>189</sup>

What Brian C.J. was trying to say was that the contract became binding when wholly executory, though the right to possession and payment only arose later; to explain what was meant by binding he should have concentrated upon the point that neither party could withdraw unilaterally after perfection, rather than the mysterious passing of 'property,' and made this the consequence of the perfection of the contract.

Brian C.J. thus ran together two separate aspects of contract: bindingness and actionability. The passing of property idea he employed as a justification for the rule that the actions of debt and detinue could be brought upon a wholly executory, though binding, contract. It followed that, without making or arranging for payment, the buyer could sue in detinue but the seller could excuse himself with the special plea that he was ready to deliver if the buyer had paid.<sup>190</sup>

Simpson<sup>191</sup> points out that Brian C.J.'s theory was raised to orthodoxy in the



nineteenth century through the offices of Blackburn, later Lord Blackburn, in his *Treatise on the Effect of the Contract of Sale*.<sup>192</sup> The learned author translated the 1478 case in which the conflicting theories had been stated and, disagreeing with Manning's note on *Bailey v. Culverwell*,<sup>193</sup> concluded that bargain and sale passed the property without delivery. The question in the year book was the effect of non-payment:<sup>194</sup>

Littleton and Choke seem to have thought that the construction of the bargain, was, that it was to be a ready money transaction, and that therefore there was no intention to change the property. Brian clearly thought that the bargain was one of mutual trust, and that the property passed, but not the right of possession. His judgment might have been delivered yesterday, and it is precisely what the law is understood to be after the lapse of three centuries and a half. But none of the judges seem to have had the least doubt that the property might be changed without the delivery of the goods.

He thought it superfluous to repeat the modern authorities on the passing of property idea, but did caution that the legal property transferred was not absolute or unqualified, being subject to the unpaid vendor's rights.<sup>195</sup>

The association between detinue, the ascertainment of the goods, and the passing of property idea affects the interpretation of section 52 of the Sale of Goods Act 1979.

#### Detinue against a Stranger<sup>196</sup>

Suppose that no voluntary transaction had occurred between the plaintiff and the defendant, and that the latter had found or stolen the goods in question. In the local courts the plaintiff used the action *de re adirata*.<sup>197</sup> *Adiratum* was derived from the low Latin *adextratum*, "that which is gone from my hand,"<sup>198</sup> and what was important was that the goods had gone without the plaintiff's consent. The action had nothing to do with debt. The usual subject was a strayed beast, the identity of which was the centre of the dispute. Should the defendant deny the plaintiff's allegation that the beast was his, the plaintiff could turn the action into one of theft. The reverse was not true: a criminal charge could not be lowered to a civil.<sup>199</sup> Bracton wrote into his *Note Book*<sup>200</sup> the story of Edith of Wackford, who sued William Nuthatch in the manorial court at Windsor for wrongfully detaining her three lost piglets (*qui ei fuerunt addirati*) littered by her sow. Difficult as some of the steps in the proceedings are to fathom,<sup>201</sup> it is at least plain that, confronted with his denial of wrongful detention, and of her property in the animals, and after taking legal advice, Edith raised the civil charge to a criminal charge of theft. He was eventually convicted and she recovered her piglets.

The action *de re adirata* may well have been confined to the local courts.<sup>202</sup>

Most *res adirata* were probably not valuable enough to meet the forty-shillings requirement.<sup>203</sup> For those plaintiffs who could meet the requirement but could show neither a bailment nor a voluntary transaction such as sale, the clerk nevertheless penned the ordinary writ which charged the defendant with unlawfully detaining the chattel. In doing so, the clerk extended the scope of the writ so as to cover a different and separate concept-- a move which has caused legal historians some puzzlement.<sup>204</sup> In this new type of detinue the plaintiff would still have to solve the problem of establishing his right to the possession of the chattel. Where the beast had been lost or stolen, and the plaintiff had no way of knowing how it came to be in the defendant's possession, the count was necessarily a bare assertion. A note in the year book of 1294<sup>205</sup> says that if in his count of the wrongful detention of a lost thing the plaintiff states that he lost it on a certain day, found it in the defendant's house, and unsuccessfully asked him to restore it, then the plaintiff "must prove by his own law (his own hand the twelfth) that he lost the thing." In different circumstances he might be able to do better than backing a bald assertion with law wager: he might have facts to lay before the court and thus show how the chattel passed out of his hands, through others', into those of the defendant. Known as detinue *devenit ad manus defendantis*, this count was more general than detinue *sur bailment* or on a sale of goods.<sup>206</sup> The narration provided answers to the questions about the identity of the chattel and the respective rights of the parties to its possession.<sup>207</sup> It was, however, a risky way of counting, open to objections by the defendant who could show a break in the alleged chain of possession: for example, there might be a quibble whether an intermediary had received it in his private capacity or as a representative for someone else, and the courts preferred to avoid having to decide knotty legal problems.<sup>208</sup>

### Detinue *Sur Trover*<sup>209</sup>

What was needed was a general count less likely to be upset by objections and quibbles. The middle section of the *devenit ad manus* count was later omitted, so that the plaintiff simply alleged his own loss and the defendant's finding, and added that the defendant had refused to hand back the thing when asked. Holdsworth traces instances of detinue *sur trover* early in the fourteenth century,<sup>210</sup> but the one which settled the new count, *Carles v. Malpas*,<sup>211</sup> was heard in the next. Suing to recover a sealed box which held title deeds, the plaintiff counted that it had come into the defendant's hands by finding (*per inventionem*). Littleton dissuaded Prisot C.J. from sustaining the objection raised by Wrangford, counsel for Malpas, that Carles's title to the land was insufficiently

established to ground his claim to the deeds. At the end, Littleton privately (*secrettement*) observed that the declaration of finding in the count was a "new-found haliday," the old counts of detinue having been either the *devenit ad manus* or the *sur bailment*. Fifoot says that a haliday or holiday was in Littleton's time a trifling or irrelevant incident, a quirk or conceit.<sup>212</sup> The *Oxford English Dictionary*<sup>213</sup> confirms "holiday" as meaning "idle, trifling," but although it gives a colloquial nautical usage as "A spot carelessly left uncoated in tarring or painting," no entry is directly in point with Fifoot's interpretation as a noun. A different opinion about the abstruse expression is Milsom's,<sup>214</sup> that Littleton was alluding to a matter decided a century before in which the first defendant was named Halyday, a matter which had centred on the rule that a *devenit ad manus* count obliged the defendant to answer the allegation of wrongful detention of the plaintiff's chattel. "The point of any narrative in the count, that it established the identity of the thing, was therefore lost, and some pleaders seem to have used *devenit ad manus* as a bare assertion on its own."<sup>215</sup> For the plaintiff a further advantage of the new count lay in the rule that, as against the person entitled to the chattel, finding did not transfer property to the finder.<sup>216</sup> Thus Scrope J. said *obiter* in a trespass dispute, "If you had found the charter in the street, I should have my recovery against you by the *Praecipe quod reddat*."<sup>217</sup> The defendant was barred from traversing the loss and finding if he could offer no special plea of lawful acquisition; and the trover count became a fiction.<sup>218</sup> If it favoured the plaintiff who had to adduce fewer details, it also relieved the defendant who, free from the strict liability imposed by bailment or sale, could successfully plead accidental loss, because the basis of the action was his wrongful detention.<sup>219</sup> *Sur bailment* and *sur trover* became the two predominant forms of detinue.<sup>220</sup>

### Defects of Detinue

The potential obstacle posed by the defendant's law wager we have discussed.<sup>221</sup> Further disadvantages followed from the classification of detinue as an action originated by the writ *Praecipe quod reddat*. Obligated to do right according to the terms of the writ, the defendant could avoid liability in detinue if he returned the chattel, and he was only liable for damages in this kind of action if he failed to do so.<sup>222</sup> In the meanwhile, he might with impunity misuse the chattel,<sup>223</sup> damage it,<sup>224</sup> or make alterations such that it became part of something else by accession or confusion or was changed in itself by specification.<sup>225</sup> The action could work unfairness to the other side as well, for it rendered liable only the possessor at the time of suit, a defendant who might be innocent

or less blameworthy than a wrongful dealer through whose hands the chattel had passed.<sup>225</sup> A title acquired by the defendant in market overt, however, defeated the plaintiff's.<sup>225</sup>

### Notes

1. Sale of Goods Act 1979, (c. 54). The Act applies to contracts of sale of goods made on or after 1 Jan. 1894: s. 1(1). "Goods" includes in Scotland all corporeal moveables except money; and, in particular, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale: s. 61(1).
2. Sale of Goods Act 1893 (56 & 57 Vict. c. 71). The 1979 Act repealed all sections of the 1893 Act except s. 26: 1979 Act, Sched. 3.
3. E.A. GOWERS, THE COMPLETE PLAIN WORDS 120-1 (B. Fraser (ed.), 1977). A distinguished civil servant, he had been called to the Bar by the Inner Temple in 1906: DICTIONARY OF NATIONAL BIOGRAPHY 1961-1970 449 (1981).
4. H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 122 (1980).
5. [1952] A.C. 15, 53.
6. Wilson, 37 M.L.R. 497, 501 (1974).
7. Hire Purchase Act 1965 (c. 66), s. 66(1); Hire Purchase (Scotland) Act 1965 (c. 67), s. 16(1).
8. CHALMERS' SALE OF GOODS ACT 1979 INCLUDING THE FACTORS ACTS 1889 & 1890 239 (M. Mark (ed.), 18th ed., 1981).
9. 1890, 17 R. (H.L.) 1.
10. The name of the ship in *Dampskibsselskabet Aurdal and Others v. Compania de Navigacion La Estrella* 1916 S.C. 882 (2d Div.), hence *Aurdal v. Estrella*.
11. The introduction to the first edition is reprinted in the 18th (*supra* n. 8), vii-ix. The quotation appears at viii.
12. CHALMERS' SALE OF GOODS ACT 1979, vii.
13. R. BROWN, TREATISE ON THE SALE OF GOODS WITH SPECIAL REFERENCE TO THE LAW OF SCOTLAND 383-5 (1911).
14. The cases decided before 1911 were *Sutherland v. Montrose Shipbuilding Co.*, 1860, 22 D. 665 (1st Div.); *Purves v. Brock*, 1867, 5 M. 1003 (1st Div.); *Davidson v. Macpherson*, (1889) 30 S.L.R. 2 (2d Div.).
15. 10 OXFORD ENGLISH DICTIONARY 202 (1961).
16. 2 G.J. BELL, COMMENTARIES ON THE LAWS OF SCOTLAND 214 (supplementary deeds or acts) (5th ed., 214) (7th ed., 200); (supplementary sequestration) (5th ed., 409).
17. W. BELL, DICTIONARY AND DIGEST OF THE LAW OF SCOTLAND 958 (1838).
18. 10 O.E.D., 201.

19. *Id.*, 202.
20. 4 THE REGISTER OF THE PRIVY COUNCIL OF SCOTLAND 611 (A.D. 1585-1592) (1881).
21. R. COKE, ELEMENTS OF POWER AND SUBJECTION 135 (1660).
22. STAIR, INST. 4.45.12 (oath in supplement).
23. ERSKINE, INST. 1.2.17 (letters of supplement).
24. 1 G.J. BELL, COMM. 348 (referring to Wood v. Kello M. 12728 on oath in supplement); 2 COMM. 63 (writ of supplement).
25. W. BELL, *supra* note 17, 378-9.
26. O.E.D., *supra* note 18; E. PARTRIDGE, ORIGINS: A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH LANGUAGE 683, 504 (1958).
27. PARTRIDGE, *supra* note 26, 504.
28. OXFORD LATIN DICTIONARY 1882 (1982).
29. 2 AULUS GELLIUS, ATTIC NIGHTS 18.1. The Peripatetic's question is at 11, Favorinus's criticism at 12-14, the quoted passage at 14. The Latin text is the Loeb Classical Library's, the translation J.C. Rolfe's, with a few changes. *Supplementum* was used particularly of military reinforcements: O.L.D. 1882. *Supplere* meaning "to fill up" is also used, for example, by CATO, ON AGRICULTURE 88.1. in a recipe for bleaching salt: *suppletoque*. On Favorinus, see L. HOLFORD-STREVENS, AULUS GELLIUS Ch. 6 (1988); on ATTIC NIGHTS 18.1., *id.* 48-9, 78, 208.
30. DIGEST 1.1.7.1.
31. Sale of Goods Act 1979, s. 61(1).
32. Para. 3 of the Memo. to the Bill: M.D. CHALMERS, THE SALE OF GOODS INCLUDING THE FACTORS ACT, 1889 iv (1890).
33. *Id.*, 81.
34. (18 & 20 Vict. c. 97).
35. M.D. CHALMERS, THE SALE OF GOODS ACT, 1893, INCLUDING THE FACTORS ACTS, 1889 & 1890 97 (1894).
36. *Id.*, 98.
37. J.P. BENJAMIN, A TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY 995 n. 4 (5th ed., the one which appeared after the 1893 Act was passed) (1906).
38. R. BROWN, SALE, 384.
39. My account owes much to J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (2nd ed., 1979) (hence BAKER, INTRO); C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT (1949) (hence FIFOOT, H.S.C.L.); W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW (various dates) (hence H.E.L.); S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2nd ed., 1981) (hence MILSOM, H.F.C.L.); T.F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (5th ed., 1956) (hence PLUCKNETT, CONCISE HISTORY); F. POLLOCK & F.W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (2nd ed., reissued, 1968) (hence P. & M.); and A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF

ASSUMPSIT (1975) (hence SIMPSON, H.C.L.C.).

40. PARLIAMENTARY PAPERS, REPORTS OF COMMISSIONERS (1854-5): 4th Vol. [1977] Mercantile Laws, Second Report.
41. (17 & 18 Vict. c. 125).
42. 1 P. & M. 529. Most of the work was Maitland's: *see* his letter to Stephen, 27 July 1894: THE LETTERS OF FREDERIC WILLIAM MAITLAND 137-9 (C.H.S. Fifoot (ed.), 1965) and Pollock's preface (1 P. & M. vi). "Sir Frederick Pollock's contribution-- a chapter on the Anglo-Saxons [Vol. 1, ch. 2]-- is reliably reported to have caused Maitland to speed up his writing of the remainder, in order to prevent any more pieces coming from his collaborator": G.R. ELTON, F.W. MAITLAND 5 (1985). Elton is not wholly fair to Pollock, who also wrote "the Introduction (not quite all) ... and the bulk, not the whole, of the chapter on the Early History of Contract [Vol. 2, ch. 5], ... expanded and rearranged from an article in [6] *Harv. Law Rev.* [389 (1893)]: Pollock to Holmes, 23 August 1895, 1 HOLMES-POLLOCK LETTERS 60-1 (M. Howe (ed.), 1942), quoted in C.H.S. FIFOOT, FREDERIC WILLIAM MAITLAND: A LIFE 139-40 (1971).
43. 1 P. & M. 529-30.
44. *Id.*, 530.
45. Maitland's phrase, *id.*, 530-1.
46. *Id.*, 531.
47. 1 P. & M. 531-2.
48. *Id.*, 532.
49. Exchequer in the 12th C.: BAKER, INTRO 16; Common Bench (called the Common Pleas from Tudor times onwards) certainly by Magna Carta 1215, cl. 17 and Magna Carta 1225, cl. 11: *id.*, 17 and n. 12; 1 H.E.L. 56, 196-7: King's Bench in the 14th C.: BAKER, *id.*, 36. See also PLUCKNETT, CONCISE HISTORY, 46 *et seq.*
50. 1 H.E.L. 42-4.
51. *Id.*, 232-42.
52. BAKER, INTRO 36.
53. 1 H.E.L. 198.
54. 1 H.E.L. 8, 72 on the county court. 1 P. & M. 557 on the hundred court. On the court baron, 1 H.E.L. 184, "... all kinds of personal actions...."; 2 H.E.L. 382, "The tenants of the manor were not slow to sue one another whenever they had, or thought they had, a cause of complaint. Actions of debt, detinue, and covenant are frequent."
55. 1 P. & M. 553, citing 1 BRITTON 155 and FLETA 133.
56. 1 H.E.L. 72-3.
57. 6 Edw. I c. 8.
58. 1 P. & M. 554.
59. Beckerman, *The Forty-Shilling Jurisdictional Limit in Medieval English Personal Actions*, in LEGAL HISTORY STUDIES 1972 110, 111-2 (D. Jenkins (ed.), 1972).
60. *Id.*, 112.
61. BAKER, INTRO 49.

62. *Id.*, 50.
63. *Id.*, 54-5.
64. *Id.*, 55.
65. A TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL X.2. (G.D.G. Hall's ed. and tr., 1965, 116-7).
66. F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 20 (1981 repr.); MILSOM, H.F.C.L. 243, 252-3.
67. 2 H.E.L. 172.
68. 2 P. & M. 598 n. 2.
69. *Id.*, 598.
70. 2 H.E.L. 105-6.
71. 1 H.E.L. 300-1. Production of suit was abolished by the Common Law Procedure Act 1852 (15 & 16 Vict. c. 76), s. 49.
72. 2 P. & M. 607.
73. 2 H.E.L. 106; 3 H.E.L. 631; 2 P & M 611, 615 n. 2. At 615 n. 2, Maitland quotes BRACTON'S NOTE BOOK, pl. 177 for a special plea to an action of debt. The plaintiff starts by denying everything and then lays the foundation of a confession and avoidance with the words "Sed verum vult dicere."
74. The defendant would want to be awarded the proof. If the plaintiff had not offered trial by battle, the defendant added to his defence the words "And this he is ready and willing to defend when and where he ought as the court shall consider." The court would then award him some "law" such as wager, and tell him to produce a certain number of compurgators: 2 P. & M. 610. See SIMPSON, H.C.L.C. 138: "in effect he offered to guarantee that he would successfully exculpate himself by an oath that he owed nothing. If his offer was accepted by the court, he was then given a day on which to appear and perform his oath...." By the 15th C. half the defendants entitled to wage law chose jury trial instead: J.H. BAKER, THE REPORTS OF SIR JOHN SPELMAN Vol. II (Selden Society 94) 116.
75. 1 H.E.L. 301.
76. 2 P. & M. 634; 1 H.E.L. 307.
77. H.C. LEA, SUPERSTITION AND FORCE 34 (4th ed., revised, 1892).
78. *Id.*, 35 *et seq.*
79. 1 H.E.L. 306, citing SELECT PLEAS OF THE MANORIAL COURTS Vol. 1 (Hen. III & Edw. I) (Seld. Soc. 2)-- 7 (n. 1: "He must bring five compurgators."), 8 (this does not appear to support Holdsworth's contention), 17 (12 sworn jurors: again, it is thought, not in point)-- six; 140, 151 (Robert Russell, "he and two others with him, so that they were short of three men" : i.e., the number required was in fact six)-- three; 173-- five.
80. FLETA Vol. 2, 63.10 "... up to the number of twelve." (Seld. Soc. 72, 211). Who wrote this innovation upon Bracton's treatise remains obscure. Research points to Matthew Cheker (or de Scaccario): PLUCKNETT, CONCISE HISTORY 265.
81. 1 H.E.L. 306 and n. 4.
82. Y.B. 16 Edw. III (Rolls Series) ii, 16.

83. COKE ON LITTLETON 295, otherwise E. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWE OF ENGLAND.
84. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \* 343.
85. In the text at 2 P. & M. 601, Maitland said that a normal number of oath-helpers was twelve, but in note 2 he stated the uncertainty whether this included the defendant. 2 H. BRUNNER, DEUTSCHE RECHTSGESCHICHTE 384 (1887) had said that the number might sometimes be inclusive, sometimes not. In England the number eleven was older, being sanctioned by the Statutum Walliae, c. 9. In London twelve were required in the thirteenth century.
86. 2 P. & M. 601.
87. LEA, *supra* n. 77, 64-5.
88. 1 H.E.L. 305-6.
89. *Id.*, 306. Despite having committed a mortal sin, the defendant went unpunished on earth. The common-law courts refused to hear perjury indictments or to allow the church courts to do so in regard to laymen's debts. In 1587 the Star Chamber decided that perjury was not a crime: Anon, Goulds. 51, pl. 13; 75 E.R. 988: SIMPSON, H.C.L.C. 138.
90. If met by the defendant's affirmative plea, the plaintiff denied it and waged his law: 2 P. & M. 634.
91. 1 H.E.L. 307. Defendant's own acts: York v. Swinburne (1312) Y.B. 5 Edw. II (Seld. Soc. 33) at 2 *per* Stanton J. Wager by proxy was disallowed, so it was closed to the ill, imprisoned, or reclusive: SIMPSON, H.C.L.C. 139. Executors and administrators of the deceased defendant were forbidden to wage their law: Anon (1373) Eyre of Kent 6 & 7 Edw. II (Seld. Soc. 27) 41; 3 BLACKSTONE. COMM. \*347; SIMPSON, H.C.L.C. 143. Debts on parole contracts perished with the deceased.
92. 1 H.E.L. 307.
93. 3 BLACKSTONE, COMM. \*346.
94. 1 H.E.L. 307 and n. 6, citing Hotot v. Rychemund (1310) Y.B. 3 & 4 Edw. II (Seld. Soc. 22) 199-200. *See*, too, COKE ON LITTLETON 292; City of London v. Wood 12 Mod. 669 (1701); 88 E.R. 1592 *per* Hatsell B.
95. 1 H.E.L. 307. On compulsory contracts (e.g., a gaoler's providing a prisoner with food; an attorney's services; a servant engaged under the Statutes of Labourers) *see* 3 BLACKSTONE, COMM. \*346 and SIMPSON, H.C.L.C. 140-1.
96. 1 H.E.L. 307 n. 7, citing Wood, *supra* note 94. £400 penalty under the Act of Common Council 7 Car. I, the accused having declined to serve as sheriff of London and Middlesex. Holt C.J. (677; 1596) said: "[H]e is guilty of a wrong in refusing obedience to this Act of Common Council ... so that his non-compliance with this law, by which he was bound, is the wrong which is the foundation of this action. And whenever a man is charged with a penalty for an injury or wrong done by him, or an act of disobedience done by him, he cannot wage his law."
97. FIFOOT, H.S.C.L. 28; Croke v. Ellis (1306) Y.B. 2 & 3 Edw. II (Seld. Soc. 19, Append. I, 194).
98. (1309) Y.B. 2 & 3 Edw. II, *supra* n. 97, 195, quoted by FIFOOT, H.S.C.L. 29. Fifoot says that in Wulghes v. Pepard (1310) Y.B. 4 Edw. II (Seld. Soc. 26) 14 the facts were not notorious. *Note*, though, that the defendant failed to appear on the appointed day.



99. (1344) Y.B. 17 & 18 Edw. III (R.S.) 510; FIFOOT, H.S.C.L. 29.
100. (1345) Y.B. 19 Edw. III (R.S.) 328; FIFOOT, H.S.C.L. 29.
101. The belief of Christians during the age of faith: SIMPSON, H.C.L.C. 139; BAKER, Seld. Soc. 94, 116 and [1971] 29 C.L.J. at 230.
102. In [1971] 29 C.L.J. at 228, Baker says that the knights of the post, whose use was allowed by the courts, were found for a litigant by the porter or court-usher. The porter or usher received a fee for doing so, and the wager-men theirs for swearing falsely. The latter risked being pilloried, hence the jocund reference to the "post." They were particularly helpful to a defendant required to make his law *instante* who would be non-suited if he failed to gather twelve compurgators immediately. As well as the references given in Baker's footnotes, for the meaning of "Knight of the post" see 5 O.E.D. 734; 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) s.v.; E. PARTRIDGE, A DICTIONARY OF SLANG 653 (8th ed., 1984); BAKER, INTRO 65.
103. MILSOM, H.F.C.L. 67.
104. SIMPSON, H.C.L.C. 139.
105. PLUCKNETT, CONCISE HISTORY 116; SIMPSON, H.C.L.C. 139 n. 3.
106. Milsom, 77 L.Q.R. 257, 261 (1961).
107. MAITLAND, FORMS OF ACTION, 141. See also BAKER, Seld. Soc. 94, 116 and n. 4.
108. 2 P. & M. 605 and n. 2.
109. BAKER, INTRO 67-8.
110. Latterly wager was the single oath of the defendant and was out of use for two centuries before its abolition: BAKER, INTRO 65. In actions of debt, wager was "virtually abolished ... as an institution" and effectively ended by *Slade's Case*, 4 Co. Rep. 92 (1597-1602); SIMPSON, H.C.L.C. 298; MILSOM, H.F.C.L. 354; PLUCKNETT, CONCISE HISTORY 647-8; FIFOOT, H.S.C.L. 359-60; BAKER, INTRO 288.
111. 2 B. & C. 538 (1824); 107 E.R. 489; 1 H.E.L. 308; LEA, *supra* n. 77, 86-7.
112. (3 & 4 Will. IV c. 42), s. 13.
113. BAKER, INTRO 263; SIMPSON, H.C.L.C. 5-6.
114. BAKER, INTRO 263.
115. BAKER and SIMPSON, *supra* note 113. At 19 Simpson says that a covenant was an agreement to do something in the future, and "contracts" were among those transactions which actually conferred or released rights in things.
116. GLANVILL, *supra* n. 65, Hall's translation.
117. BAKER, INTRO 55 n. 12, 200; MAITLAND, FORMS OF ACTION 18-19; SIMPSON, H.C.L.C. 55.
118. 2 P. & M. 204-5; FIFOOT, H.S.C.L. 25; MILSOM, H.F.C.L. 262; SIMPSON, H.C.L.C. 55; BAKER, INTRO 55.
119. 2 P. & M. 205.
120. *Id.*, 206; SIMPSON, H.C.L.C. 56, but note that though the *unde* vanished, the *ei* remained.
121. MILSOM, H.F.C.L. 262-3. An heir was regarded not as a representative but as a successor, and so when suing another heir he correctly sued a writ in the *debet et detinet*: Clare's Case (1339) 12 & 13 Edw. III (R.S.) 168, Trewith, and Bodesham

- v. Rose (1342) 16 Edw. III (R.S.) ii, 382: discussed in SIMPSON, H.C.L.C. 60.
122. MILSOM, H.F.C.L. 263. The point is made that the word *detinet* in the writ did not necessarily mean that the action was detinue. (Equally, though, *debet* never appeared in an action of detinue: FIFOOT, H.S.C.L. 28). See, too, SIMPSON, H.C.L.C. 58-9, who describes the controversy among lawyers of the 15th and early-16th CC. On one view, the claimant of a thing (even a specific thing) which he had never possessed before bringing the action would claim what was due to him by contractual grant, and his action would be in debt, not detinue. The writ's form would be the same whether he sued as buyer of a thing sold or as bailor of a thing in which he already had property. But the counts would differ, the buyer's being in debt, the bailor's in detinue. The sale, because it conferred on the buyer a right to the goods, was a form of grant. This was Fitzherbert's classification (NEW NATURA BREVIVM 119G), and Simpson adopts it.

On the other view, the buyer sued in detinue. This was the opinion of Fortescue C.J. in Doige's Case (1442) Y.B. Trin. 20 Hen. VI, f. 34, pl. 4, quoted in FIFOOT, H.S.C.L. at 439; and of Brian C.J. in Anon (1478) Y.B. 17 Edw. IV Pasch. f. 1, pl. 2, quoted by Fifoot at 253.

At 59 n. 1, Simpson refers to Milsom's article in 77 L.Q.R. 257, 273-5. It therefore appears that he is speaking of the law at the stage at which Milsom discusses it, viz., before the passing of property rule was established. After that rule was accepted, it was clear that the buyer claimed specific goods in detinue: see *supra*, p. 133 *et seq.*
123. A. FITZHERBERT, NEW NATURA BREVIVM f. 272 *et seq.* (Writ of Debt), f. 222 *et seq.* (Detinue) (1730 ed.), cited MILSOM, H.F.C.L. 264 n. 2.
124. REGISTRUM OMNIUM BREVIVM f. 139 (1634 ed.), cited MILSOM, H.F.C.L. 264 n. 2, who remarks that except for f. 159 (De cartis reddendis) there is no heading of detinue.
125. MILSOM, H.F.C.L. 264-5.
126. FITZHERBERT, *supra* n. 123, quoted and translated by BAKER, INTRO 440.
127. BAKER, INTRO 325.
128. Source: BAKER, INTRO 324, 325-6.
129. The early form of denial was *non tenetur* and the later form was *non detinet*: MILSOM, H.F.C.L. 267.
130. See Brown in Y.B. 20 Hen. VI f. 16, pl. 2; Ames, 11 HARV. LAW REV. at 376, 383 (1897-8).
131. Milsom, 17 UNI. TORONTO L.J. 1, 8-9 (1967).
132. 2 H.E.L. 367-8 (debt and detinue); FIFOOT, H.S.C.L. 25 (detinue). For the difficulty in using modern concepts of "obligation" and "property" to analyse medieval personal actions, see SIMPSON, H.C.L.C. 75-6.
133. 7 H.E.L. 438 and n. 5.
134. Y.B. 6 Hy. VII Mich. pl. 4 (p. 9) 1.
135. 2 Bulst. 306; 80 E.R. 1143.
136. FITZHERBERT, *supra* n. 123, fol. 138 (i.e., 272 on Debt).
137. Cro. Eliz. 824 (1601); 78 E.R. 1051.
138. Willes 118 (1738); 125 E.R. 1087.
139. 3 BLACKSTONE, COMM. \*152.

140. COKE ON LITTLETON 286. Blackstone seems to have Sect. 498 in mind.
141. 11 Irish Common Law Reports 93 (1877).
142. [1926] 1 K.B. 223 (C.A.).
143. 4 Taunt. 643 (1812); 128 E.R. 483.
144. 5 Taunt. 176 (1813); 128 E.R. 654.
145. 12 East 614 (1810); 104 E.R. 239.
146. BENJAMIN, *supra* 9 n. 4, 334-6, 338.
147. 1 BELL, COMM. 198 and Lord McLaren's note in n. 3. As Scrutton L.J. pointed out (*Laurie & Morewood* [1926] 1 K.B. at 235), McLintock's counsel had referred to the doubts expressed by Benjamin and Bell on *Whitehouse* 12 East 614: *see Hayman & Son v. McLintock* 1907 S.C. 936 (1st Div.), 944 and n. 5.
148. 1907 S.C. 936 (1st Div.). In *Laurie & Morewood* [1926] 1 K.B. at 235-6, Scrutton L.J. quoted from L.P. Dunedin's judgment in *Hayman & Son* at 951.
149. 3 H.E.L. 354 *et seq.*
150. Milsom, 77 L.Q.R. 257, 273 *et seq.*; H.F.C.L. 266.
151. 3 H.E.L. 354-5. At 355 n. 1, Holdsworth cross-refers to 354 n. 1. For the citations to Bracton and Fleta the second page reference in 2 P. & M. should be to 210 of the 2d ed. reissued in 1968. For the rule that delivery of the goods sold was necessary, *see also* BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND, f. 61, "Of acquiring dominion by purchase" (Vol. II, at 182 of S.E. Thorne's ed., 1968).
152. FIFOOT, H.S.C.L. 223; MILSOM, H.F.C.L. 250 (debt on an obligation) 253 (on a contract); SIMPSON, H.C.L.C. 53; BAKER, INTRO 268, 269.
153. BAKER, INTRO 269-71; SIMPSON, H.C.L.C. 88-126.
154. *Supra* p. 131.
155. 3 H.E.L. 355 and, on *quid pro quo*, 421; BAKER, INTRO 268.
156. 3 H.E.L. 355.
157. J.B. AMES, LECTURES ON LEGAL HISTORY 71, 78 (1913) (hence AMES, LECTURES). Holdsworth's citation (3 H.E.L. 356 n. 1) to 11 H.L.R. 259 is incorrect.
158. (1470) Y.B. 49 Hen. VI (Seld. Soc. 47) 163; FIFOOT, H.S.C.L. 228, 251.
159. 3 H.E.L. 356 and n. 4.
160. *Id.*, 357 and n. 1.
161. Core's Case, Dyer at f. 22b (1537); 73 E.R. 42, 47, where Fitzjames C.J. referred to a ruling by Frowicke C.J. in Y.B. 20 Hen. VII 8b.
162. 77 L.Q.R. at 273-5.
163. Ward's Case (1342-3) Y.B. 17 Edw. III (R.S.) 141. On the writ *de rationabili parte* and the rights of the widow and children to their reasonable parts of the deceased estate, *see* 2 P. & M. 352-6; 3 H.E.L. 550; PLUCKNETT, CONCISE HISTORY 744-6; MILSOM, H.F.C.L. 270; FIFOOT, H.S.C.L. 30. In n. 35, Fifoot also mentions the modern Scots law of the widow's terce and the bairn's legitim, and cites W.M. GLOAG & R.C. HENDERSON, INTRODUCTION TO THE LAW OF SCOTLAND ch. XL.
164. 23. Divers notes, I. (De debito) Y.B. 3 & 4 Edw. II (Seld. Soc. 22) 26.

165. Milsom, 77 L.Q.R. at 273.
166. Groome's Case (1348) Y.B. Pasch. 21 Edw. III, pl. 2, f. 11d at f. 12, R. Thorpe, cited by Milsom, 77 L.Q.R. at 273 n. 13.
167. Milsom, 77 L.Q.R. at 274 n. 14.
168. *Id.*, 274 nn. 15 and 16.
169. *Id.*, 274 n. 17.
170. Y.B. Mich. 20 Hen. VII, pl. 18, f. 8d; Milsom, *id.*, 274 n. 19.
171. Y.B. Mich. 8 Hen. VI, pl. 24, f. 10, discussed in 77 L.Q.R. 274-5, 275 n.20.
172. Milsom, 77 L.Q.R. 275 n. 21.
173. Milsom, 77 L.Q.R. at 275.
174. Core's Case, *supra* n. 161, quoted in 3 H.E.L. 357 n. 1.
175. Milsom, 77 L.Q.R. at 273: "Specific goods should *a priori* be claimed in detinue, unascertained goods (and presumably fungible goods from stock) in debt. But if Holdsworth is right this cannot *at first* have been true: detinue supposes a property in the plaintiff, and until the passing of property idea was established all actions by buyers, even for specific goods, must have been debt in the *detinet*.<sup>7</sup>" (Emphasis of "at first" supplied.) Milsom's note 7 refers to 3 H.E.L. 355.
176. Particularly helpful on the relation of payment to the passing of property idea are SIMPSON, H.C.L.C. 164-9; FIFOOT, H.S.C.L. 228-9; MILSOM, 77 L.Q.R. 275-6. I follow Simpson.
177. (1442) Y.B. Trin. 20 Hen. VI, f. 34, pl. 4; FIFOOT, H.S.C.L. 347; Seld. Soc. 51, 97.
178. *See*, too, FIFOOT, H.S.C.L. 228, who mentions Tailbois v. Sherman (1443) Y.B. 21 Hen. VI f. 55, pl. 12, and Anon (1458) Y.B. 37 Hen. f. 8, pl. 8 as cases in which the passing of property idea was aired in relation to the sale of goods.
179. SIMPSON, H.C.L.C. 165, citing Milsom, 77 L.Q.R. 275 and references in the latter's nn. 24-6.
180. SIMPSON, H.C.L.C. 165 and n. 6.
181. Anon (1478) Y.B. 17 Edw. IV Pasch. f. 1, pl. 2; FIFOOT, H.S.C.L. 252-4, a trespass suit for asportation of growing corn, the defendant pleading that the plaintiff had sold it to him.
182. Choke J.'s ground for decision was the unreasonable consequence of a double sale if the property passed even though the first buyer had not paid: if property were to pass, the first buyer could compel the seller to keep the horse for ever against the seller's will and could take it whenever he, the first buyer, wished. FIFOOT, H.S.C.L. 229, 253 n. 8, criticizes the judge for muddling three distinct questions--contractual liability, transfer of property, and right to possession-- and, at 229, approves Brian C.J.'s judgment as having restored the case to its proper perspective. But as Simpson shows, if any of the three judges fell prey to confusion it was Brian C.J.: *see supra*, p. 138. More supportable is Fifoot's censure of Choke J.'s forgetting his earlier remarks in *Veer v. York*, *supra* n. 158: Choke J. had used the example of the purchase of a horse for 20s. and had said that the 20s. were due to the seller immediately, because the purchase passed the property in the horse to the buyer, who could have possession. However, "under the promptings of counsel," as Fifoot remarks, "[Choke J.] admitted that, while property might thus be transferred, the possession could not be demanded unless the price had been paid or credit granted." This resembled Brian C.J.'s opinion in the trespass

matter of 1478. There it may have been Littleton J.'s leading judgment which caused Choke J.'s departure from his views expressed in *Veer*: Littleton was firm that if the buyer took a piece of cloth without paying ready money, the seller could bring an action of trespass to which the only defence would be the seller's proving that he had paid the price.

183. SIMPSON, H.C.L.C. 166.
184. *Id.*, founding on Wheler's Case 14 Hen. VIII Hil. f. 15, pl. 1, f. 18., pl. 7.
185. SIMPSON, H.C.L.C. 166-7. At 167 n. 1, Simpson's references include 49 Hen. VI, Seld. Soc. 47, p. 163; i.e., *Veer v. York*. Though *Veer* does, as Simpson says, refer to the "property" doctrine, it is submitted that, because Choke J.'s ruling on the passing of property despite non-payment resembles that of Brian C.J., the proponent of what Simpson calls the unorthodox theory, *Veer* is equivocal and may be as much an authority in support of the unorthodox as of the orthodox theory for which Simpson cites it.
186. Anon (1478) Y.B. 17 Edw. IV f. 1, pl. 2; (1479) Y.B. 18 Edw. IV Hil. f. 21, pl. 1; SIMPSON, H.C.L.C. 167 and n. 4.
187. SIMPSON, H.C.L.C. 167 n. 5 says that Brian C.J. did not discuss the giving of earnest or the fixing of a future date for payment.
188. (1478) Y.B. 17 Edw. IV: *see* FIFOOT, H.S.C.L. at 253; SIMPSON, H.C.L.C. 167-8.
189. SIMPSON, H.C.L.C. 168.
190. *See* Brian C.J.'s words, translated by SIMPSON, H.C.L.C. 168.
191. SIMPSON, H.C.L.C. 169.
192. C. BLACKBURN, A TREATISE ON THE EFFECT OF THE CONTRACT OF SALE; ON THE LEGAL RIGHTS OF PROPERTY AND POSSESSION IN GOODS, WARES, AND MERCHANDIZE 190 *et seq.* (1st ed., 1845).
193. *Bailey v. Culverwell*, 2 Man. & Ry. 568n. 108 E.R. gives the B. & C. 448 report, which does not contain the serjeant's note.
194. BLACKBURN, *supra* note 192, 195-6.
195. *Id.*, 197.
196. Sources: MILSOM H.F.C.L. 269-75; BAKER, INTRO 326-7.
197. MILSOM, H.F.C.L. 271 and n. 1.
198. 2 P. & M. 161 n. 4; AMES, LECTURES 80 n. 3.
199. 2 P. & M. 161.
200. BRACTON'S NOTE BOOK, pl. 824.
201. Kaye suggests four possible reasons for Edith's change of tactics: 86 L.Q.R. 379, 392-3 (1970).
202. In NOVAE NARRATIONES (Seld. Soc. 80, clxxxviii) Milsom says that the action *de re adirata* was probably confined to the local courts. In H.F.C.L. 271 he says, "[A]ppeals and even more their preliminaries were clearly local matters. But at the end of the thirteenth century some such claims seem to have been made by bill before justices in eyre [Milsom's note 2: Kaye, *supra* note 201; (1294) Y.B. 21 & 22 Edw. I (R.S.) 467]; and this may be why compilers of formularies of counts of for royal courts thought it worthwhile to include counts captioned *De beste adire* or the like [Milsom's note 3: NOVAE NARRATIONES, *supra* B233-4, C337]. But as a regular institution the eyre was at an end, and with it its humdrum business by bill. If such claims were now to be made in the royal courts, it would

have to be in the common pleas and by writ." AMES, LECTURES 81-3 doubted whether the action *de re adirata* existed in the royal courts: there was no evidence of it in them, and references to it were much earlier than the texts which began to speak of detinue. He discussed the 1294 Year Book note (incorrectly citing Y.B. 20 & 21 Edw. I) and the count in NOVAE NARRATIONES f. 65. (translated in 3 H.E.L. 321, it is for a lost horse: Seld. Soc. B233 and C337; a form of words indicates that the action lay for household goods too: B234, clxxix). Ames remarked that the count appeared among those on trespass, not on detinue. Having stated the origin of detinue *sur trover*, he described a count in LIBER INTRATIONUM f. 22 for detinue of charters found. Though the counts of *de re adirata* and of detinue *sur trover* resembled each other, they differed in that the plaintiff counting on the former would say that he himself had found the chattel in the defendant's possession, whereas the plaintiff counting on the latter would say that the finding had been made by the defendant.

Holdsworth noted Ames's opinion but relied on the 1294 note as showing that information about the action *de re adirata* was found useful in the royal courts (3 H.E.L. 321 and n. 4). That a judge finds information about an action in another court useful does not necessarily mean that he allows that same action in his own court or that the action which he does allow may not be an essentially different legal entity even though it shares a few characteristics with the other action. I suggest that Potter overstates Holdsworth's point when he says that the learned historian "thinks that Ames is wrong in his opinion that the proceedings for *res adiratae* could not be brought in the Royal Courts, and cites as his authority a note from 1292....": POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 399 (4th ed. by A.K.R. KIRALFY, 1958) (hence POTTER, HIST. INTRO.). The note in the year book is in fact dated 1294.

203. 3 H.E.L. 321; MILSOM, H.F.C.L. 271.
204. MILSOM, H.F.C.L. 271.
205. (1294) Y.B. 21 & 22 Edw. I (R.S.) 466-8. Note that this is further evidence that the number of compurgators was eleven, and is an example of the *plaintiff's* having to wage his law to back a bare assertion.
206. FIFOOT, H.S.C.L. 32; BAKER, INTRO 327.
207. BAKER, INTRO 326; MILSOM, H.F.C.L. 272.
208. BAKER, INTRO 327; MILSOM, H.F.C.L. 272-3.
209. Source: BAKER, INTRO 327.
210. 3 H.E.L. 325-7.
211. Carles v. Malpas (1455) Y.B. Trin. 33 Hen. VI f. 26, pl. 12; FIFOOT, H.S.C.L. 42; BAKER, INTRO 327 n. 31. At 33 Fifoot supplies biographical details of Malpas.
212. FIFOOT, H.S.C.L. 33 n. 47.
213. 5 O.E.D. 338.
214. MILSOM, H.F.C.L. 273. In [1954] C.L.J. at 113 n. 41 he qualifies the conjecture as "wild but not impossible." The Halyday case was (1355) Y.B. Trin. 29 Edw. III f. 38v, cited MILSOM, H.F.C.L. 273 n. 1.
215. MILSOM, H.F.C.L. 273.
216. BAKER, INTRO 327; FIFOOT, H.S.C.L. 32.

217. Y.B. 2 Edw. III Hil. f. 2, pl. 5; 3 H.E.L. 326 n. 2; FIFOOT, H.S.C.L. 32 n. 44.
218. BAKER, INTRO 327; FIFOOT, H.S.C.L. 34.
219. BAKER, INTRO 327; FIFOOT, H.S.C.L. 34 n. 51; MILSOM, H.F.C.L. 274.
220. FIFOOT, H.S.C.L. 34.
221. *Supra* p. 129-31.
222. The bailee who disabled himself from restoring the chattel was damnifiable in detinue for its value. In Y.B. 20 Hen. VI f. 16, pl. 2, Brown argued unsuccessfully that if the bailee drank up bailed wine with *bons compagnons* he would be liable in account but not detinue. Newton C.J. ruled detinue competent. See AMES, LECTURES 72 and n. 2; FIFOOT, H.S.C.L. 102 n. 6. MILSOM, H.F.C.L. 326-7 (1st ed., 1969) explained the bailee's liability thus: "Detinue *sur bailment* retained a legacy from its early analysis as a claim indistinguishable from debt. The bailee owed the thing just as the debtor owed the money.... Mere non-possession, whether for good reason or bad, did not justify a bailee in pleading *non detinet*." See H.F.C.L. 264-5, 269, 274, 368 (2d ed., 1981).  
The finder's liability was distinct from debt and bailment, and rested wholly on the defendant's possessing the chattel at the time of the action: MILSOM, H.F.C.L. 374 (2d ed.). A thing destroyed was no longer detainable. Sued in detinue *sur trover*, the defendant pleaded that the cause of action and the subject-matter had perished simultaneously: BAKER, Seld. Soc. 94, 248. HOLDSWORTH, 3 H.E.L. 350 and n. 7 thought non-bailees exempt from liability for damages in detinue where they had made delivery impossible. "Upon this point," says FIFOOT, H.S.C.L. 102, "Professor Potter [HIST. INTRO. 396 (3d ed., 1948), 408 (4th ed., 1958)], like Ames [LECTURES 84], is content to doubt." Disputed is (1472) Y.B. Mich. 12 Edw. IV f. 13, pl. 9, an action on the case, Brian C.J. differing from his brethren by holding for the defendant sub-bailee. Appearing to disagree with MILSOM, H.F.C.L. 274 (2d ed.), Simpson in 75 L.Q.R. 364, 371-2 (1959) observed that the circumstances and intention of the defendant's parting with possession might have been important. Was deliberate destruction of the thing a valid excuse? In (1535) Y.B. 27 Hen. VIII f. 13, pl. 35 [see A.K.R. KIRALFY, THE ACTION ON THE CASE 113 (1951)], Fitzherbert C.J. said that one who comes to the goods by finding is not to be chargeable if he is *lawfully* out of possession before the action is brought by the person entitled. (Emphasis supplied.) It all depends, says Simpson, what was meant by "lawfully."
223. AMES, LECTURES 83; 3 H.E.L. 350 n. 5; POTTER, HIST. INTRO. 345-6; BAKER, INTRO 328.
224. 3 H.E.L. 350 and n. 6; FIFOOT, H.S.C.L. 102; POTTER, HIST. INTRO. 345; BAKER, INTRO 328.
225. BAKER, INTRO 328.

## Chapter 7: The Influence of Tort on Contract: Trespass, Trover and Conversion

Undermined by the frailties of detinue, resourceful countors turned from the law upholding plaintiffs' rights to the law punishing defendants' wrongs. Trespass (French for the Latin *transgressio*)<sup>1</sup> was a derivative from a single action given by the local courts for the redress of all serious private wrongs.<sup>2</sup> The story of how it became a cornerstone of English law opens when the justices began to hear disputes about infractions of the King's interest, whether breaches of his peace or franchises, or derogations from special duties.

Pre-eminent among his interests was the maintenance of the protection which from Saxon times the King had conferred on certain persons, places, and seasons:<sup>3</sup> the persons were his servants and ministers, his favourites, and possibly those willing to buy his protection;<sup>4</sup> the places included his court and its environs,<sup>5</sup> the four great Roman roads<sup>6</sup> and progressively the common ones running between his cities, boroughs, castles, and havens;<sup>7</sup> the seasons comprised his coronation day and various church feasts such as Christmas, Easter, and Whitsuntide.<sup>8</sup> From a special privilege his peace broadened into a principle of governance throughout the realm.<sup>9</sup> Until 1272 it died with him, for England had not yet the fiction that the King never dies; but at Henry III's death while his heir was on crusade in the Holy Land,<sup>10</sup> a group of the foremost nobles, to settle the uncertainty which might lead to civil mischief during this hitch in the succession, proclaimed Edward's peace on his behalf.<sup>11</sup> Henceforth the institution endured perpetually. Its breach was the exclusive province of the royal courts<sup>12</sup> and carried stringent process for securing the defendant's presence: contumacy towards the sheriff's summons invited arrest under the writ *capias ad respondendum* or, if the defendant could not be found, outlawry.<sup>13</sup> Once this criminal machinery applied first to trespass<sup>14</sup> and then to some other civil actions,<sup>15</sup> plaintiffs awoke to the tactical possibilities of bringing its greater speed and decisiveness to bear upon defendants otherwise favoured by the slowness and gradualism of medieval procedure.<sup>16</sup> Moreover, the royal courts exercised jurisdiction superior to the local courts', and after 1200 the conclusiveness of their decisions reduced to a central record and backed up by effective final process was much to be preferred.<sup>17</sup> The King, for his part, profited from the fees, fines, and forfeitures which swelled his Exchequer and helped fund expeditions against those vexatious Scots.<sup>18</sup> The commonest trespasses which, as breaches of his peace, might come before his courts were wrongs to land, persons, and goods: the subject-matter of general writs of trespass.<sup>19</sup> Rarer, on the whole, and



needing extra information from the plaintiff, were disputes in which the defendant's wrong emerged from the narrative in the writ, or concerned breaches of special rights or special duties: these entered Westminster by special writs of trespass,<sup>20</sup> which set out the additional details, the plaintiff's "case," in a *cum* clause after the standard order that the defendant should appear before the justices and show why (*ostensurus quare*) he had committed the wrong.<sup>21</sup> Unlike the *Praecipe* family, the trespass family, being concerned with irrevocable wrongs, gave the defendant no alternative but to appear in court.<sup>22</sup>

Having increasingly busied the justices under Henry III, trespass actions flooded the royal courts during the interregnal abeyance of the peace.<sup>23</sup> In order, it seems, to stem the inundation, the Statute of Gloucester (1278) provided that sheriffs should hear trespasses in their counties as the custom was.<sup>24</sup> *Vi et armis*, hitherto stressing grave breaches of the King's peace, was now rehearsed in trespass writs as the password to the royal jurisdiction, a debased doublet for *contra pacem domini Regis*, in order that the plaintiff might circumvent the statutory rule of exclusion and, by getting his dispute into the royal court, obtain the associated benefits of procedure.<sup>25</sup> Fiction was the outcome, and the language of boisterous, well-armed activity received novel applications, as where Rattlesdene's writ in the Common Bench narrated that after he had bought a tun of wine from the Grunestons and left it in their custody, they with force and arms, to wit, swords and bows and arrows, had drawn out a large part of its contents and substituted salt water, ruining the wine.<sup>26</sup> From 1370, however, the masks were slowly lowered: the justices eased the statutory restraint, and to their bar gathered a manageable number of plaintiffs who, in those trespass matters which required extra details, no longer mouthed the phrases of dissimulation.<sup>27</sup> Here was the unveiling of case.

Case-- trespass on the special case, trespass on the case-- formed large sections of English tort and contract, and its influence upon the idea of conversion resulted in the tort of trover and conversion. "The word 'conversion' ... is old."<sup>28</sup> Its original sense was almost one of accounting: it denoted the application of assets to one purpose rather than to another, not necessarily wrongful. ... But the conversions with which lawyers were concerned were usually wrongful.<sup>29</sup> The best illustration is the executor who, while the testator's specialty debts remain unpaid, takes some of the testator's funds for his own purposes. Suing on the testator's debts as their causes of action, his creditors look to his executor for payment according to the terms of the judgment. Always a definite concept, conversion did not at first compose a distinct cause of action or relate much to specific goods; those changes would come through what we are about to

discuss.

Conversion as a distinct cause of action developed from the conflict between the action on the case and the action of detinue.<sup>30</sup> A bailee was liable on the case if the goods were damaged.<sup>31</sup> If they were destroyed, allowed to perish, or were alienated, the proper remedy was detinue.<sup>32</sup> As an army besieging a fortified city tests the thickness of the walls and the mettle of the inhabitants, so did plaintiffs probe the limits of detinue, here in relation to packaged goods, there in relation to unpackaged.<sup>33</sup>

Disputes about packaged goods widened the meaning of conversion and laid bare a gap in the actions of debt and detinue. So far as we know, the *Carrier's Case* (1473),<sup>34</sup> in which the King's Council debated whether a carrier who opened a package entrusted to him and misapplied its contents committed a felony, was the first time that "conversion" was used to mean a wrong.<sup>35</sup> There Choke J. appears to have invented the notion of "breaking bulk," whereby a defendant would do wrong if, having peaceably received a container, he then opened it and misappropriated its contents.<sup>36</sup> Civil actions of this nature recur in the early sixteenth century and expose the poverty of the older law.<sup>37</sup> The plaintiff could demand the container in detinue, but not the extracted money in debt: what was he to do if a stakeholder ran off with half of it and bought his sweetheart a copy of Malory's *Le Morte D'Arthur*? The action on the case may have offered the solution.<sup>38</sup> Furthermore, "[a]fter 1499 at the latest, the conversion was often laid as a conversion, not of the goods bailed, but of the proceeds of their sale, which indicates an extension of the remedy from cases of unidentifiable money or plate to specific and identifiable goods."<sup>39</sup>

When the goods were unpackaged the plaintiff was no less eager to press the legitimacy of case. In *Rilston v. Holbek* (1472)<sup>40</sup> a sub-sub-bailee had cut up gold cloth for making into clothes and it was alleged to have been devalued from £40 to 40s. Inconclusive arguments lasted three years. The bailor's executor we think contended that the physical change being irreversible, property in the cloth had passed by *specificatio* and no longer inhered in the plaintiff for the purposes of a detinue action, and therefore the way was open for an action on the case. The factual point carried at least one judge in *Cadwodeleghe v. John* (1479),<sup>41</sup> where a sub-sub-bailee had broken up silver cups and, fashioning them into vessels of a different shape, converted them to his own use. Choke J. approved the *Rilston* argument that the plaintiff should not be driven to claim what was ineluctably a different chattel. Sustaining Tremayle's argument on the day, however, the cautious Brian C.J. ruled that the silver was not in fact irrevocably gone from the plaintiff, who, anxious though he might be to evade law

wager, was not allowed to brush aside the established remedy, which lay for both the thing and for its value. Simpson<sup>42</sup> infers that the Chief Justice might have permitted an action on the case if he had found the property altered. *Rilston* and *Cadwodeleghe* he apparently distinguished on their facts. Both exemplify conversion as the unlawful change of the thing's identity by *specificatio*; it was by a semantic shift that the word came to signify an unlawful appropriation to the defendant's use.<sup>43</sup> Baker<sup>44</sup> says that more research must be done on the fifteenth-century plea rolls to confirm Simpson's arguments; Milsom<sup>45</sup> depreciates *specificatio* as being not the origin but merely a form of conversion.

Since purists held that bailment was adequately covered by one form of detinue, plaintiffs wanting to bring actions on the case turned their cold eyes upon the other and saw that although it caught the possessor at the time of suit it absolved the finder or stranger who had wrongfully relinquished possession before then. Where detinue *sur trover* could not reach, there the action on the case would lie, and without judicial reproach.<sup>46</sup> Into the King's Bench, the court which showed itself the most amenable to this new action,<sup>47</sup> came plaintiffs who, checked at first by the uncertainties of pleading,<sup>48</sup> won through in 1531 when Wyse brought the new count of trover and conversion against Andrewe. Wyse had lost a purse which Andrewe later acquired by a finding and failed to restore on demand. To this count of detinue *sur trover* Wyse added that, scheming to defraud him of its contents, Andrewe had removed them and converted the proceeds of their felonious sale. Vainly pleading acquisition of the purse in market overt (a process which would have given him a title superior to the true owner's), Andrewe was ordered to pay damages.<sup>49</sup> Twenty-three years later the Common Pleas allowed the new count when in *Lord Mounteagle v. Worcester*<sup>50</sup> a gold chain lost by the lord reached the hands of the lady by a finding and she deceitfully sold it to persons unknown and pocketed the cash. One of the several criticisms which Dyer makes in his report is that without an allegation in the writ that the chain had been acquired in market overt, detinue remained proper and the action on the case should not lie. This flaw did not, however, stop the court's holding for the lord.<sup>51</sup>

The balance of importance between the divisions of the new count shifted from the old to the new. Conversion became the gist, the substance of the action,<sup>52</sup> trover the preamble, untraversable and in many instances fictitious.<sup>53</sup> Barristers then spotted that the latter could be turned as a weapon against detinue, and the court need be told only what the plaintiff decided that it was convenient to reveal: jettisoning the claim on a bailment, bailors acknowledged the wrongful sale of the goods and sued bailees as

strangers or finders. The unease of conservatives at this sly ouster of detinue *sur bailment* was not alleviated by the reflection that were the trover count to be made traversable, then, by equal reasoning, the finding in detinue *sur trover* would have to be made so as well, a retrograde move, and detinue *sur trover* would totter.<sup>54</sup> Actions on the case caught all possessors for misuse of the goods; trover and conversion, all non-bailee possessors for destruction; inevitably, trover and conversion then caught bailees who had destroyed the goods, or what from the bailor's point of view amounted to the same result, had unlawfully sold them to someone else.<sup>55</sup>

The next advance of conversion at the expense of detinue was accomplished by the conclusive reply to a question. If the defendant simply detained the goods or refused to deliver them on request to the plaintiff, did his conduct evidence a conversion? The King's Bench thought yes, the Exchequer Chamber thought no,<sup>56</sup> and a test case settled nothing.<sup>57</sup> Then in 1614, in *Isaack v. Clark*,<sup>58</sup> the King's Bench returned the decisive answer. Fifoot summarizes the facts thus:<sup>59</sup>

A. had obtained judgment against B. for £40. B. did not pay and disappeared. Execution was then ordered upon the goods of C., who was one of B.'s pledges, and D., a court official, accordingly seized three butts of wine. E., a friend of C., sought to stop the sale of the wine and proposed to ask A. to abandon the execution against C. It was therefore arranged that D. should temporarily return the wine to C., and, as security for its re-delivery to D. if A. continued to insist on the execution, E. deposited with D. a purse containing £22. E. now sued D. for the conversion of the purse and money.

The jury found specially that although C. had not persuaded A. to stop the execution, E. had demanded the purse and money from D., who had refused. Was D.'s refusal a conversion?, the jury wanted to know. The court (Coke C.J., Haughton, Dodderidge, Croke, JJ.) absolved D. Coke C.J. held, "... in this case we do all of us agree ..., that prima facie, a denyer upon a demand is good evidence to a jury of a conversion; but if the contrary be shewed, then the same is no conversion."<sup>60</sup> *Isaack* therefore confirmed the practice of the King's Bench, as declared, for example, by the Chief Justice in *The Chancellor of Oxford's Case*.<sup>61</sup> Everything turned on the particular facts: the defendant's refusal raised a presumption that he was guilty of conversion, but he rebutted it by reasonably explaining that his refusal did not constitute a denial of the plaintiff's title and an assertion of his own contrary title.<sup>62</sup> In *Isaack* the sheriff, D., was obliged to restore the purse and money to E. only upon C.'s persuading A. to halt the execution, and until that condition was fulfilled, D.'s conduct remained lawful. E.'s

action failed.

In *Isaack Coke* C.J. painstakingly distinguished the ambits of conversion and detinue: the bailee's refusal to deliver on request attracted detinue *sur bailment*.<sup>63</sup> The eclipse of detinue by conversion took place in 1675, when Windham J. held in *Sykes v. Wales*<sup>64</sup> that "trover lyeth on bare demand and denial against the bailee." *Put and Hardy v. Rawsterne*,<sup>65</sup> *Skinner v. Upshaw*,<sup>66</sup> and an anonymous case of 1702<sup>67</sup> confirmed the extension, and Blackstone<sup>68</sup> dispensed with citing authority for the statement that trover lay "against any man who had in his possession by any means whatsoever the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded."

Conversion became a tortious action for the redress of infringements upon proprietary interests.<sup>69</sup> It alleged that the defendant had denied the plaintiff's title,<sup>70</sup> and it protected what was variously termed property or possession.<sup>71</sup> What exactly--possession? the right to possess? ownership?<sup>72</sup> *Ratcliffe v. Davis*<sup>73</sup> established that "possession" covered the right to possess. *Wilbraham v. Snow*<sup>74</sup> and *Arnold v. Jefferson*<sup>75</sup> allowed the action to a possessor, *Armory v. Delamirie*<sup>76</sup> to an unauthorized finder, thereby substantiating the basic principle of the common law that "the possessor is *prima facie* owner, and has all the rights of an owner except as against one who can show a better right."<sup>77</sup> But he who could show neither actual possession nor the right to possess was not so fortunate: though the writ might speak of "property," *Gordon v. Harper*<sup>78</sup> overruled *Ward v. Macauley*<sup>79</sup> to declare that the action did not protect bare ownership. Put differently, the legal conclusion is that the bare owner lacks the immediate right to possess which the plaintiff separated from the goods must prove.<sup>80</sup> Lastly, at common law the actual possessor, as presumptive owner, could seldom be met by the plea that a third party enjoyed a superior right in the goods (*ius tertii*); the exception was the defendant acting under the authorization of the true owner or upon title acquired from him.<sup>81</sup> If, however, the plaintiff was asserting his right to possess, the defendant might contest it by showing a *ius tertii*:<sup>82</sup> in *Leake v. Loveday*<sup>83</sup> a buyer of furniture on a bill of sale allowed the seller continued possession; the seller went bankrupt, and title in the furniture passed by operation of law to his assignees in bankruptcy; on a writ of *fiери facias* a sheriff seized and sold the furniture for other creditors of the bankrupt, and when sued by the buyer out of possession successfully pleaded the superior title of the assignees. The common law of *ius tertii* has been abolished by statute.<sup>84</sup>

Yet a further consequence flowing from the proprietary nature of trover and

conversion is that proprietary claims normally exclude defences of honest mistake. The idea of conversion accorded with the narrow principle *mobilia non habent sequelam*, that the owner who voluntarily delivers his chattel to another must sue that person alone if it leaves his possession, and cannot reach non-bailees.<sup>85</sup> But in formulating a doctrine of the ownership of chattels, English law has tended to favour the wider principle that the owner may vindicate his chattel wherever he finds it, and so the defendant is constrained by the principle *nemo dat quod non habet*.<sup>86</sup> The scope of conversion broadened proportionately.<sup>87</sup> In 1590 Archer, who had resold the goods in question, pleaded that he had consistently believed his own seller to be entitled; but his plea failed.<sup>88</sup> Those seventeenth-century cases<sup>9</sup> which seemed to uphold the plea of innocence were overruled and the competence of some of their reporters was impugned by Lord Mansfield C.J. in *Cooper v. Chitty*.<sup>90</sup> *Hollins v. Fowler*,<sup>91</sup> a decision of the House of Lords, settled the defendant's liability as strict: "any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion."<sup>92</sup> In general, therefore, the action lies not only against a bailee or the possessor of the goods but also against any intermediary dealer through whose hands they have passed; and the plaintiff, who must not recover damages twice over, may sue whomever he chooses.<sup>93</sup>

### Notes

1. 2 P. & M. 512; BAKER, INTRO 56.
2. The debate on the origin of trespass, and on the development of trespass *vi et armis* and trespass on the case, is classic. See the references in MILSOM, H.F.C.L. 283-4 and the conspectus in FIFOOT, H.S.C.L. ch. 3. As regards the development of trespass *vi et armis* and trespass on the case, I follow Milsom's theory as expounded in 74 L.Q.R. 195, 407, 561 (1958); 81 L.Q.R. 496, 501-5 (1965); H.F.C.L. ch. 11. SIMPSON, H.C.L.C. 199 n. 3 acknowledges that the first article has "largely supplanted all previous studies of the subject." Historians had previously thought that trespass derived from some other entity such as the appeal of felony or the assize of novel disseisin and had then itself produced case. Plucknett, 47 COLUM. L. REV. 778 (1931) and 52 L.Q.R. 68 (1952), argued that the *in consimili casu* clause of the Statute of Westminster II (1285), 13 Edw. 1 c. 24, had played no part in the development of case from trespass. The traditionalists Holdsworth, 47 L.Q.R. 334 (1931) and Landon, 52 L.Q.R. 68 (1932) criticized his iconoclasm. Dix sorted each side's strengths and weaknesses (46 YALE L.J. 1142-5 (1937)) and contended that the year books reveal the judges to have adapted trespass *vi et armis* to meet new circumstances beyond the requirements of that writ (*id.*, 163 *et seq.*). Milsom demolished the axiom that, from the 13th C. to the present, "trespass" had maintained its meaning and scope

intact and constant as a definite body of law concerned with direct, forcible wrongs. He displayed such 13th and 14th C. writs as the franchise holder's against a black marketeer who had evaded dues payable to the holder; writs which, though applicable to wrongs neither direct nor forcible, were for trespass and not originally for trespass on the case. Hence he arrived at his central thesis that trespass just meant wrong and that the distinction between trespass *vi et armis* and case was imposed by the workings of the royal courts' jurisdiction, not having grown out of an inherent difference between the two actions (*see esp.* 74 L.Q.R. at 583-90).

The local incidence of trespass was recognized by AMES, LECTURES 179 n. 3 and 2 F.W. MAITLAND, COLLECTED PAPERS 151 n. 1. That trespass originated from local procedure was stressed by H.G. RICHARDSON & G.O. SAYLES, SELECT CASES OF PROCEDURE WITHOUT WRIT UNDER HENRY III (Seld. Soc. 60), cviii, cxxxiii: "All the evidence seems to be consistent with the crystallising out of a series of criminal and civil actions from a single undifferentiated action for all serious private wrongs." *See also* PLUCKNETT, CONCISE HISTORY 366-7, 370. FIFOOT, H.S.C.L. 479 remained unconvinced.

3. 2 P. & M. 453; F. POLLOCK, *The King's Peace*, in OXFORD LECTURES AND OTHER DISCOURSES 65, 75 *et seq.* (1890) (hence POLLOCK, OX. LECT.); 2 H.E.L. 48.
4. POLLOCK, OX. LECT. 76; MILSOM, H.F.C.L. 287. In Saxon the peace given by the king's own hand was the *kinges hand-sealde grið*: LAWS OF EDWARD THE CONFESSOR c. 12. Its breach was irredeemable by payment of money; the defendant was thrown upon the king's mercy, could be lawfully slain for resisting capture, and if he escaped was counted outlaw. Harboursing him was the equally serious offence, *flymena-fyrmd*: POLLOCK, OX. LECT. 76, 86.  
The king's peace could also be granted by writ: LAWS OF EDW. THE CONFESSOR c. 12; POLLOCK, OX. LECT. 75. The Scots analogue was the medieval *brieve* granting the king's protection: Harding, 11 J.R. (N.S.) 115-121 (1966). A separate legal *brieve*, the *brieve* to remedy a breach of the king's protection, ordered the Scots sheriff to summon the breacher so that he might answer the king and do what justice demanded: *see* No. 48 in the Edinburgh MS. of the REGISTRUM BREVIUM, quoted by Harding, *id.*, 133.
5. "Whoso fights in the king's house, be all his heritage forfeit, and be it in the king's doom whether he shall have his life or not": INE c. 6; POLLOCK, OX. LECT. 73. In the 11th C. the king's peace covered a radius of three miles, three furlongs, and a fraction from his residence: POLLOCK, *id.*, 80-1.
6. Watling and Irmin Streets, Foss and Icknield Ways: POLLOCK, *id.*, 80-1.
7. *Id.*, 82; 2 P. & M. 464.
8. POLLOCK, OX. LECT. 75, 78.
9. Extent: implicit in LEGES HENRICI PRIMI, quoted in POLLOCK, OX. LECT. 80; 83, 87. Principle: "common right," POLLOCK, *id.*, 88; "all-embracing atmosphere," 2 P. & M. 464; "governmental abstraction," MILSOM, H.F.C.L. 287.
10. Prince Edward's crusade: 3 S. RUNCIMAN, A HISTORY OF THE CRUSADES 335-8 (1955).
11. W. STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY 438-40 (9th ed., 1913); POLLOCK, OX. LECT. 87-8.

12. Breach of the king's peace was a plea of the crown, and such pleas had to come before the royal courts: Magna Carta (1215) c. 24, "Nullus vicecomes, constabularius, coronatores, vel alii ballivi nostri, teneant placita coronae nostrae," Magna Carta (1225) c. 17; PLUCKNETT, CONCISE HISTORY 421-3, 426-7; MILSOM, H.F.C.L. 287; BAKER, INTRO 413.
13. MAITLAND, FORMS OF ACTION 40; MILSOM, H.F.C.L. 293. Cf. the opening words of the Scots QUONIAM ATTACHIAMENTA: "Quoniam attachiamenta sunt principia et origo placitorum de wrang et unlaw": Harding, *supra* n. 4, 141.
14. BRACTON, TREATISE, f. 441a (Vol. 4, 368-9). In relation to trespass, outlawry resulted only in forfeiture of goods, not death: just as there was major and minor excommunication, so there was major and minor outlawry: BRACTON f. 441a (Vol. 4, 369). See 3 H.E.L. 606 nn. 7 and 8. Forfeiture of goods lasted until the Forfeiture Act 1870 (33 & 34 Vict. c. 23).
15. Account, Westminster II, c. 11 (1285); debt, detinue, and replevin, 25 Edw. III, st. 5, c. 17 (1352); case, 19 Hen. VII, c. 9 (1504).
16. Medieval procedure overshadowed its younger sister, substantive law: MAITLAND, FORMS OF ACTION 63. PLUCKNETT, CONCISE HISTORY 380 explains that its slow caution and allowance for lapses were shaped by a context of widespread illiteracy in those whom it affected and the dishonesty of some sheriffs and many of their servants. Observance of its minutiae furnished the constitutional protection of due process. See also 2 P. & M. 591; 3 H.E.L. 625. We should not suppose that the extension of *capias* and outlawry allowed the civil actions to be instituted in a flash: three *capias* writs had to issue at fifteen-day intervals before outlawry could be sought: BAKER, Seld. Soc. 94, 90, 91 nn. 1 and 2. But the signal advantage of the new process lay in correcting the abuse called fourching of essoins. An essoin was a defendant's excuse for not appearing in court. Joint defendants could bait the plaintiff by offering essoins alternately and endlessly (fourching of essoins), in one debt matter for seven years ((1345) Y.B. 19 Edw. III (R.S.) xxvi): 3 H.E.L. 625-6. When *capias* and outlawry were extended to debt, plaintiffs largely forsook covenant: MILSOM, H.F.C.L. 252.
17. BAKER, INTRO 134; Seld. Soc. 94, 51-2.
18. PLUCKNETT, CONCISE HISTORY 145 and n. 7; POLLOCK, OX. LECT. 83; BAKER, INTRO 134.
19. Milsom's classification: *Part I: General Writs*, 74 L.Q.R. 195, 195-222. Wrongs to land: ejectment (198); reaping crops (201); depasturing (202); hunting, shooting, fishing (204). Wrongs to the person: assault and battery (207); false imprisonment (209); wrongs to servants (210); abduction (*id.*). Wrongs to goods: *de bonis asportatis* (goods carried off) (212); damage (a) by fire (213), (b) by animals (215), and (c) by other means (218).  
Another wrong to land was breaking a close (*clausum fregere*): e.g., the fishing case at 74 L.Q.R. 206 (*quare ... fregerunt parcum*); MAITLAND, FORMS OF ACTION 43; PLUCKNETT, CONCISE HISTORY 373 (the writ *quare clausum fregit* was the freeholder's equivalent for the termor's writ *de ejectione firmæ*); BAKER, INTRO 57.
20. Milsom, *Part II: Special Writs*, 74 L.Q.R. 407-36. Narrative matter: reciting a title (410); telling a story (411); rescue and pound breach (412); pillory, free boar, free fold (413); rights of way (416). Franchises and other special rights: waifs, strays, and wrecks (417); market and fair (418); tolls and other dues (423), jurisdictional franchises (425). Special duties: under statute (428), royal command (*id.*); repair (430); upon innkeepers (434).



21. Examples of general and of special writs: Milsom's articles, *supra* notes 19-20; MAITLAND, FORMS OF ACTION 72 (Trespass *vi et armis*), 73 (Trespass on the Case). Actions started by special writs depended on their own facts, hence the expressions "*sur le case*," "*en le case*," "on the case": Milsom, 74 L.Q.R. 587.
22. R.C. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVIL (Seld. Soc. 77), 244-8; 3 BLACKSTONE, COMM. 274 ("peremptory" original writs of trespass); SIMPSON, H.C.L.C. 199-200; PLUCKNETT, CONCISE HISTORY 366; BAKER, INTRO 56-7; MILSOM, H.F.C.L. 243-4. Examples of writs for trespass *vi et armis* and for trespass on the (special) case: MAITLAND, FORMS OF ACTION 72-3; BAKER, INTRO 442-3.
23. PLUCKNETT, CONCISE HISTORY 366-7; Milsom, 74 L.Q.R. 578; H.F.C.L. 288.
24. 6 Edw. I c. 8: "Purvue est ensement qe viscuntes pleident en Cuntees les plesz de trespas ausi com il soloient estre pleidez": 1 STATUTES AT LARGE 67 (1863); MILSOM, H.F.C.L. 288.
25. MILSOM, H.F.C.L. 289; 74 L.Q.R. 588-9 (implications of the Statute of Gloucester 1278), 575-8 (significance of including *vi et armis*), 574-5 (extension of *capias* to trespasses alleging breach of the peace); BAKER, INTRO 57; SIMPSON, H.C.L.C. 202.
26. Rattlesdene v. Gruneston (1317) Y.B. 10 Edw. II (Seld. Soc. 54) 140; MILSOM, H.F.C.L. 289. Incongruities in trespass writs, 1278-1370: Milsom's discussion of actions against smiths who shod horses negligently (H.F.C.L. 289-90).
27. MILSOM, H.F.C.L. 290-5, 300-5; 74 L.Q.R. 585-8, two early and honest writs being those in Marshal v. Waldon (1370) Y.B. 43 Edw. III, f. 33, pl. 38, and The Farrier's Case (1373) Y.B. 46 Edw. III f. 19, pl. 19; SIMPSON, H.C.L.C. 203; BAKER, INTRO 58.
28. MILSOM, H.F.C.L. 366 n. 1; BRACTON'S NOTE BOOK, pl. 687; BRACTON, TREATISE, f. 91b (Vol. 2, 264-5).
29. MILSOM, H.F.C.L. 366-7.
30. *Id.*, 368.
31. *Id.*, 367-8 (*assumpsit* or negligence or both; bailee *a fortiori* liable for deliberate damage); BAKER, Seld. Soc. 94, 248 and cases in n. 2; 227 and n. 3. Overworking a horse was a frequent complaint: KIRALFY, THE ACTION ON THE CASE 109. The bailee's liability on an undertaking to keep or carry safely is a contiguous area of the law: *see* BAKER, INTRO 329-30.
32. MILSOM, H.F.C.L. 368; BAKER, Seld. Soc. 94, 248. "Mere damage by a bailee ... never became conversion and was remediable only by an 'innominate' action [on the case]": FIFOOT, H.S.C.L. 103; Symons v. Darknoll, Palmer 523 (1628); 81 E.R. 1202.
33. MILSOM, H.F.C.L. 369 (packaged goods), 370 (unpackaged).
34. (1473) Y.B. 13 Edw. IV (Seld. Soc. 64) 30-4.
35. MILSOM, H.F.C.L. 369.
36. BAKER, Seld. Soc. 94, 319 and n. 11; Simpson, 75 L.Q.R. 372 n. 22. But PLUCKNETT, CONCISE HISTORY 449 traces the notion to the earlier *detinue* matter, Bowden v. Pelleter (1315) Y.B. 8 Edw. II (Seld. Soc. 41) xxiii-xxiv, 136. P. pleaded that goods bailed to her in a locked chest had been stolen together with her own by thieves who had broken open the chest; B. flatly contradicted her story

that the goods were enclosed; the Year Books and Plea Rolls tell us no more than that a jury was summoned to decide between the two versions. Because the notion of breaking bulk was put forward as an explanation in the pleadings and not formulated as a distinct concept by the court, Baker and Simpson's view is better.

37. MILSOM, H.F.C.L. 369; BAKER, Seld. Soc. 94, 249 and n. 3.
38. MILSOM, H.F.C.L. 369.
39. BAKER, Seld. Soc. 94, 250 and n. 3.
40. (1472) C.P. 40/844, m. 332 (case), 335d (detinue); Y.B. Mich. 12 Edw. IV f. 1, pl. 2, and f. 14, pl. 14; KIRALFY, THE ACTION ON THE CASE 109-11, 220; Simpson, 75 L.Q.R. 372-3; FIFOOT, H.S.C.L. 103-4; BAKER, INTRO 331; MILSOM, H.F.C.L. 370-1.
41. (1478) C.P. 40/868, m. 428; (1479) Y.B. Hil. 18 Edw. IV f. 23, pl. 5; KIRALFY, *supra* note 40; FIFOOT, H.S.C.L. 103, 113; Simpson, 75 L.Q.R. 373-4; BAKER, INTRO 331-2; MILSOM, 370-1. At 113 n. 61 Fifoot mistranslates "hanapers" as "hampers": the word means "cups" (BAKER, Seld. Soc. 94, 249 n. 2).
42. Simpson, 75 L.Q.R. 373-4.
43. Semantic shift: *id.*, 373-80, esp. 379-80.
44. BAKER, Seld. Soc. 94, 248.
45. MILSOM, H.F.C.L. 371.
46. AMES, LECTURES 84; Milsom, [1954] C.L.J. 113-6 (criticized by Simpson, 75 L.Q.R. 371-2); H.F.C.L. 372.
47. The Common Pleas heard the first action on the case for conversion against a non-bailee (Astley v. Fereby (1510) C.P. 40/993, m. 512; BAKER, Seld. Soc. 94, 251) but "does not seem to have participated much in the early development [of trover and conversion], and it may have regarded replevin as more appropriate for the task" (BAKER, *id.*, 253 n. 4). The initiative taken by the King's Bench: BAKER, *id.*, 251; MILSOM, H.F.C.L. 374.
48. Audelet v. Latton (No. 1) (1519) K.B. 27/1030, m. 29; (No. 2) (1520-6) K.B. 27/1034, m. 50v. Audeley counted on a lengthy *devenit ad manus*; Latton traversed an important detail, the sale of the goods. A shortened count produced a six-year discussion and a verdict but no judgment. Irrked by the problems of *devenit* counts, no less in actions on the case than in detinue, judges may well have helped forward the development of the fictitious and normally untraversable count of trover. See BAKER, Seld. Soc. 94, 252-3.
49. Wyse v. Andrewe (1531) K.B. 27/1081, m. 78; BAKER, Seld. Soc. 94, 232.
50. 2 Dyer 121a (1555); 73 E.R. 265.
51. Five elements of trover and conversion: W. RASTELL, COLLECTION OF ENTREES f. 4 verso f. 5 recto (1574): P. alleged that he possessed the specified goods of a certain value as his own; (2) being so possessed, he had casually lost them out of his possession; (3) they then came into the hands and possession of D. by a finding; (4) despite P.'s frequent requests, D. had not delivered the goods to P.; (5) D. had converted them to his own use: adopted by E. COKE, A BOOK OF ENTRIES f. 38d verso (1614); FIFOOT, H.S.C.L. 104, 116-7. Trover and conversion was the detinue *sur trover* count (as found in the LIBER INTRATIONUM (1510)) with the averment of conversion subjoined: AMES, LECTURES 83. See, too, BAKER, Seld. Soc. 94, 251.

52. *La Countess de Rutland's Case*, Moore 266, 267 (1588); 72 E.R. 571, 572; *Vandrink v. Archer*, 1 Leon. 221, 223 (1590); 74 E.R. 203, 204; FIFOOT, H.S.C.L. 105 and n. 24; 7 H.E.L. 403.
53. BAKER, Seld. Soc. 94, 252-3; FIFOOT, H.S.C.L. 104-5 (the losing became fictitious: *Gumbleton v. Grafton*, Cro. Eliz. 781 (1600); 78 E.R. 1011; *Kinaston v. Moore*, Cro. Car. 89 (1626); 79 E.R. 678), (the finding equally insubstantial: *Ratcliff v. Davies*, Cro. Jac. 244 (1611); 79 E.R. 210; *Isaack v. Clark*, 2 Buls. 306, 314; 80 E.R. 1143, 1148)). Milsom, [1954] C.L.J. 114; H.F.C.L. 374 ("the trover count [was] the simplest way of making the one assertion that mattered in the action on the case; the defendant had not come to the goods by bailment from the plaintiff"). D. was entitled to traverse the allegation of finding if he had indeed found the goods, and he could then tell the court at length how he had done so: BAKER, Seld. Soc. 94, 252.
54. Milsom, [1954] C.L.J. 115; H.F.C.L. 374-5.
55. AMES, LECTURES 84-5; Milsom, [1954] C.L.J. 115.
56. BAKER, INTRO 333; 7 H.E.L. 407-8.
57. *Eason v. Newman*, Cro. Eliz. 495 (1596); 78 E.R. 745; 7 H.E.L. 408; FIFOOT, H.S.C.L. 106; MILSOM, H.F.C.L. 376-7. On a special verdict the jury asked whether D.'s refusal to deliver on request was a conversion. Fenner J., Gawdy J., and either Tanfield J. (Goulds. 152; 75 E.R. 1059) or Clench J. (Moore K.B. 461; 72 E.R. 695) held that it was. Absent then, Popham C.J. later ruled that it was not. Adjournment followed, but no judgment.
58. 2 Buls. 306; 80 E.R. 1143.
59. FIFOOT, H.S.C.L. 106; *see, also*, 7 H.E.L. 408-9.
60. *Supra* 5 n. 58, at 314; 1150.
61. 10 Co. Rep 53b (1614); 77 E.R. 1006; *Isaack*, *supra* note 58, 308; 1144 (Haughton J.), 310; 1146 (Dodderidge J.); 7 H.E.L. 408.
62. FIFOOT, H.S.C.L. 106. KIRALFY, THE ACTION ON THE CASE 112 thinks poorly of Coke C.J.'s judgment in *Isaack*, *supra* note 58, saying that it straddles the fence on most of the issues; and as a more satisfactory basis for the modern law he prefers Hobart C.J.'s ruling in *Agar v. Lisle*, Hob. 187 (1613); 80 E.R. 334: "[I]f you have goods of mine lawfully, by finding or bailment, yet when I require them of you, you can no longer lawfully hold them, and therefore when you still detain them from me, it argues, that you claim them as your own, and so you use them."
63. *Isaack*, *supra* note 58, at 313; 1149; 7 H.E.L. 410 and n. 2: three cases reported by Clayton; AMES, LECTURES 86; 7 H.E.L. 412-3.
64. 3 Keble 282 (1675); 84 E.R. 722.
65. Th. Raym. 472 (1682); 83 E.R. 246, Pemberton C.J., Jones and Raymond JJ. positively, Dolben J. *hesitante*.
66. 2 Ld. Raym. 752 (1702); 92 E.R. 3.
67. 2 Salk. (1702); 91 E.R. 557.
68. 3 BLACKSTONE, COMMENTARIES \*153.
69. *Hambly v. Trott*, 1 Cowp. 372, 374 (1776); 98 E.R. 1136, 1137; *Cooper v. Chitty*, 1 Burr. 20, 31 (1756); 97 E.R. 166, 172; 7 H.E.L. 442; P.H. WINFIELD & J.A. JOLOWICZ ON TORT 479 *et seq.* (12th ed., 1984); J.W. SALMOND & R.F.V. HEUSTON ON THE LAW OF TORTS 108 *et seq.* (19th ed., 1987); 45 HALSBURY'S LAWS OF ENGLAND 646 (4th ed., 1985).

70. F. POLLOCK, LAW OF TORTS 361 (12th ed., 1923), quoted in 7 H.E.L. 403-4 (see also 270 (15th ed., 1951)); WINFIELD & JOLOWICZ, TORT 479; SALMOND & HEUSTON, TORTS 108-9; 45 HALSBURY'S LAWS 650-1; Lancs. & Yorks. Rlwy Co. etc. v. McNicoll (1918) 88 L.J.K.B. 601, 605; Oakley v. Lyster [1931] 1 K.B. 148, 153 (C.A.); Caxton Publishing Co. Ltd. v. Sutherland Publishing Co. [1939] A.C. 178, 201-2.
71. FIFOOT, H.S.C.L. 110-1; WINFIELD & JOLOWICZ, TORT 487 and n. 11; 45 HALSBURY'S LAWS 662.
72. Meaning of possession: 35 HALSBURY'S LAWS OF ENGLAND 617-9 (4th ed., 1981); right to possession (*id.*, 619-20); ownership (*id.*, 627-8).
73. Cro. Jac. 244 (1611); 79 E.R. 210; FIFOOT, H.S.C.L. 111. The right to possess as requisite for action of conversion: Barker v. Furlong [1891] 2 Ch. 172, 179; Jelks v. Hayward [1905] 2 K.B. 460; Kahler v. Midland Bank Ltd. [1950] A.C. 24, 33-4.
74. 1 Mod. Rep. 30 (1670); 86 E.R. 708, "the best of a poor choice" of reports of the case: FIFOOT, H.S.C.L. 119.
75. 1 Ld. Raym. 275 (1697); 91 E.R. 1080.
76. 1 Str. 505 (1722); 93 E.R. 664.
77. 7 H.E.L. 426; The Winkfield [1902] P. 42, 55-6, 60 (C.A.); Glenwood Lumber Co. v. Philips [1904] A.C. 405, 410-1 (P.C.); Daniel v. Rogers [1918] 2 K.B. 228, 234 (C.A.); Moffatt v. Kazana [1969] 2 Q.B. 152, 156C-E.
78. 7 Term Rep. 9 (1796); 101 E.R. 828; FIFOOT, H.S.C.L. 112.
79. 4 Term Rep. 489 (1791); 100 E.R. 1135; FIFOOT, H.S.C.L. 112.
80. 7 H.E.L. 430-1; FIFOOT, H.S.C.L. 112; WINFIELD & JOLOWICZ, TORT 487-9; SALMOND & HEUSTON, TORTS 120-1; 45 HALSBURY'S LAWS 662-3; Lord v. Price (1874) L.R. 9 Ex. 54; Bute (Marquess) v. Barclays Bank Ltd. [1955] 1 Q.B. 202; Winkworth v. Christie, Manson & Woods Ltd. [1980] Ch. 496, 499F-H.
81. Webb v. Fox, 7 Term Rep. 391 (1797); 101 E.R. 1037; Newnham v. Stevenson, 10 C.B. 713, 723 (1851); 138 E.R. 282, 286; Jeffries v. G.W. Rlwy Co., 5 E. & B. 802 (1806); 119 E.R. 680; Barker v. Furlong [1891] 2 Ch. 172, 180-1; Glenwood Lumber Co., *supra* n. 77; Eastern Constn. Co. Ltd. v. Schmidt [1914] A.C. 197 (P.C.) (claimant of *ius sui* as donee or assignee of *tertius*; ref. to The Winkfield [1902] P. at 54); FIFOOT, H.S.C.L. 112; F. POLLOCK & R.S. WRIGHT, AN ESSAY ON POSSESSION IN THE COMMON LAW 91 (1888); Law Reform Committee, 18th Rep. (Cmd. 4774 (1971)), paras. 51-78; WINFIELD & JOLOWICZ, TORT 490; SALMOND & HEUSTON, TORTS 122-3.
82. 7 H.E.L. 429; FIFOOT, H.S.C.L. 112; POLLOCK & WRIGHT, POSSESSION 91; WINFIELD & JOLOWICZ, TORT 490 (exception: P.'s bailee estopped from denying P.'s title unless evicted by title paramount or defending the action on the true owner's behalf-- China Pacific S.A v. Food. Corpn. of India [1982] A.C. 939, 959H, Ld. Diplock, "hornbook law").
83. 4 M. & G. 972 (1842); 134 E.R. 399. See, too, Bartrum v. Williams, 4 Bing. (N.C.) 290 (1838); 132 E.R. 800; Gadsden v. Barrow, 9 Ex. 514 (1854); 156 E.R. 220, esp. Parke B.'s interjection (515; 220).
84. Sec. 8(1) of the Torts (Interference with Goods) Act 1977 (c. 32): in an action for wrongful interference with goods, D. may show, under R.S.C. Ord. 15, r. 10A, that a third party enjoys a better right than P. to all or any part of the interest

claimed by P., or in right of which P. sues. Sec. 8 is intended to avoid multiplicity of actions: WINFIELD & JOLOWICZ, TORT 491.

85. MILSOM, H.F.C.L. 377-8. Conversion alters the property: *Gumbleton v. Grafton*, *supra* n. 53; *Isaack v. Clark*, *id.*, at 309; 1145 (Dodderidge J.). *Mobilia non habent sequelam*: 2 P. & M. 155, 172.
86. MILSOM, H.F.C.L. 378; WINFIELD & JOLOWICZ 494-5; 35 HALSBURY'S LAWS 628 ("[P]rima facie an owner is entitled to possession or to recover possession of his goods against all the world"); POLLOCK & WRIGHT, POSSESSION 2, 25.
87. MILSOM, H.F.C.L. 378.
88. *Vandrink v. Archer*, 1 Leon. 221 (1590); 74 E.R. 203; FIFOOT, H.S.C.L. 107; MILSOM, H.F.C.L. 378; BAKER, INTRO 334.
89. *Bayly v. Bunning*, 1 Lev. 173 (1665); 83 E.R. 355; *Lechmere v. Thorowgood*, 1 Show. K.B. 12 (1690); 89 E.R. 416; *Cole v. Davies*, 1 Ld. Raym. 724 (1700); 91 E.R. 1383.
90. 1 Burr. 20, 35-6 (1756); 97 E.R. 166, 174-6; *cf.*, *Hartop v. Hoare*, 2 Str. 1187, 1188 (1743); 93 E.R. 1117, 1118; FIFOOT, H.S.C.L. 107-8; BAKER, INTRO 334.
91. (1875) L.R. 7 H.L. 757: "stringent doctrines of trover and conversion," *per Ld. O'Hagan*. See, too, *Stephens v. Elwall*, 4 M. & S. 259, 261 (1815); 105 E.R. 830, 831; *Consolidated Co. v. Curtis & Son* [1892] 1 Q.B. 495; *Sachs v. Miklos* [1948] 2 K.B. 23, 27 (C.A.); *Marfani & Co. Ltd. v. Midland Bank Ltd.* [1968] 1 W.L.R. 956, 971 (C.A.); *Union Finance Ltd. v. British Car Auctions Ltd.* [1978] 2 All E.R. 385, 387 (C.A.).
92. *Hollins*, *supra* note 91, Ld. Chelmsford at 795; *cf.*, Ld. O'Hagan at 199.
93. BAKER, INTRO 334; MILSOM, H.F.C.L. 378-9; 45 HALSBURY'S LAWS 685; *Morris v. Robinson*, 3 B. & C. 196, 206 (1824); 107 E.R. 706, 710; *Brinsmead v. Harrison* (1871) L.R. 6 C.P. 584, (1872) L.R. 7 C.P. 547; *Cooper v. Shepherd*, 3 C.B. 266 (1846); 136 E.R. 107. The main exceptions to the general rule of strict liability for conversion: WINFIELD & JOLOWICZ, TORT 494-6.

## Chapter 8: The Later History of Debt; *Assumpsit*

The action on the case was influential on other fronts as well. In the twelfth century the buyer of fungibles used a writ of debt for their non-delivery; by the seventeenth century he was more often bringing the action of *assumpsit*, which resulted from the interplay of various doctrines and historical circumstances and became the most important form of action concerning the modern law of contract in England. Between the fourteenth and sixteenth centuries it came into conflict with the two personal actions of covenant and debt; from the outset, it was employed by plaintiffs for whom those actions were insufficient or inconvenient. Debt we have discussed;<sup>1</sup> covenants were agreements, and the action of covenant lay to compel performance but from Edward I's reign could only be brought upon a deed under seal.<sup>2</sup> Covenant was formal; debt, formal or real.<sup>3</sup> Now suppose that a plaintiff had no document recording the agreement or transaction; that he wanted damages for the loss which he had sustained through the defendant's negligent performance (misfeasance) or non-performance (non-feasance) of the covenant or contract; that he claimed a *quantum meruit*; that the goods which were the subject of the sale were to come into existence after the conclusion of the contract; that he wished to sue the executor of a deceased debtor; or that he preferred to avoid giving the defendant the opportunity of compurgation.<sup>4</sup> In these circumstances he needed a remedy from the law of wrongs. When the royal courts admitted disputes lacking allegations of damage done *vi et armis*, and also began to concern themselves with private covenants,<sup>5</sup> plaintiffs sought to bring the kind of action already granted by the local courts and the City of London court<sup>6</sup> and to allege that the defendant having taken it upon himself (*assumpsit super se*) to do something had then done it badly to the plaintiff's damage.<sup>7</sup> These first cases of trespass on the case concerned misfeasances which had damaged the plaintiff in person or property.<sup>8</sup> The standard defence was that the dispute arose out of an agreement and should have been litigated by an action of covenant. It was therefore to be expected that this plea would succeed when the dispute related not to misfeasance but to a non-feasance: "this case sounds in covenant," the court answered the plaintiff, and if he had not taken the trouble to protect himself by means of formal writing and thus to provide himself with a remedy for the defendant's non-feasance of an agreement to act, he had only himself to blame.<sup>9</sup> Not all, however, invariably cherished Shylock's respect for formal writing,<sup>10</sup> particularly since this was not required by the local courts and could not in any event found a claim for consequential damages.<sup>11</sup> As the value of money declined and the forty-shilling limit

presented less of an obstacle, so plaintiffs cast about for a stratagem to distract the courts' attention from non-feasances and persuade them to right wrongs arising from the breach of parol agreements. The solution was found in the old action of deceit.<sup>12</sup> This, according to Fitzherbert's generalization,<sup>13</sup> caught the agent who harmed his principal by his acts in the latter's name. Law reform advanced through the deviousness of some attorneys. One such Colles was retained and paid by Somerton to procure a term of years from Boteler but despite his undertaking he maliciously revealed this confidential information to Blunt, for whom he obtained the desired term. In Somerton's successful action, Colles's failure to obtain the term was held to be non-feasance and his deceit the malfeasance of ambidexterity.<sup>14</sup> Status imposed certain duties breach of which might found *assumpsit*.<sup>15</sup> Having failed to make an entry on a court record as he had undertaken to do in return for money, a clerk of the juries named Ceveront was cast in damages for his torpor-- plain non-feasance.<sup>16</sup> From agents to principals:<sup>17</sup> in *Doige's Case*<sup>18</sup> the parties dealt directly with each other, and despite payment received and undertaking given, Mrs Doige conveyed the sold land to another. Most of the judges were at pains to separate the breach of covenant from the deceit. Some of them used the analogy of the well-recognized action of deceit for the breach of a warranty on a sale of goods. Newton C.J., C.P. proposed his doctrine of disablement as justifying the action of deceit where the buyer of the land would otherwise not recover the prepaid price. Title to the land he could receive by livery of seisin alone, which it was beyond Doige's power to make after enfeofing the third party. Equitable relief by specific performance was barred for impossibility;<sup>19</sup> at law, the action of covenant rested on the assumption, removed here, that Doige could obey the order to perform.<sup>20</sup> The doctrine of disablement enjoyed a vigorous life until towards the end of the fifteenth century the more daring of the judges began to confront the non-feasance problem directly. At a 1498 discussion in Gray's Inn<sup>21</sup> Fineux C.J., K.B. is reported as saying that if a man bargains with another to convey land for £20 but does not do so in accordance with the covenant, the covenantee has an action on his case without needing to go to chancery and sue out a subpoena.<sup>22</sup> Again, if a covenantor to build a house by a certain date does nothing about it, the covenantee has an action on his case on this non-feasance just as he would upon a malfeasance, for he has suffered damage.

The further advances took place in the other conflict, that between *assumpsit* and debt. The proponents of *assumpsit* faced the task of convincing the more conservative judges that the new action should be allowed to usurp the sphere of the old and do the work of a generalized contractual remedy.<sup>23</sup> Therefore they had to neutralize the

prohibition on overlapping remedies, which decreed that where an existing action initiated by a writ recognized in the Register covered a certain area of the law, the formless action on the case was barred, because overlapping remedies would disturb the boundaries between the actions and lead to confusion.<sup>24</sup> This prohibition was supported by the specious history that as the action on the case had originated from the chancery clerks' acting under the *in consimili casu* clause of the Statute of Westminster (1285), it was statutory and thus excluded by a common-law action such as covenant or debt which was already regarded as proper.<sup>25</sup> In this part of my thesis we are concentrating on the buyer's remedy for non-delivery, so it is more instructive to take the fungibles cases and trace the shift in thinking that occurred during the first half of the sixteenth century.<sup>26</sup>

Until 1505 the defendant to an action on the case for failure to delivery fungibles could take his ease in the tranquility which an unshakeable argument confers.<sup>27</sup> That year the dispute in the Common Pleas, *Orwell v. Mortoft*,<sup>28</sup> produced, besides the standard rulings from the majority, a powerful dissent. The plaintiff's lawyer tried to frame a non-delivery claim as an action of conversion: after the sale the seller, paid a certain sum, had undertaken the safe custody of the twenty quarters of purchased barley until a certain day, but instead he converted it tortiously and to the plaintiff's damage. The conversion claim fell apart because the barley had not been bagged and thus ascertained. In the opinion of Kingsmill, Fisher, and Vavasour, JJ., as the buyer had no interest in any particular corpus of barley at the time of the sale, property in the goods had not passed and for a mere failure to deliver on demand the general action was debt. With them Fineux C.J., K.B. is reported to have agreed: he thought the action on the case a gap-filling remedy.<sup>29</sup> Dissent heralded change. Ignore the passing of property point, urged Frowicke C.J., C.P.; the defendant's deceitful breach of the bargain on which he had been paid is a misdemeanour which has caused the plaintiff loss, and although the action of debt lies it does not exclude the action on the case, which is founded on different grounds. Frowicke C.J. referred to the doctrine of disablement and to the situation in which a bailee of money who had disobeyed instructions to bail it over and had then converted it could be sued by the bailor in debt or account or the action on the case. Already Kingsmill J.'s leading opinion for the majority had forsaken orthodoxy to the extent of acknowledging the lawfulness of the action on the case for non-feasance provided that no older action was available. Where he and his brethren could not follow their chief was in throwing aside their deference to the exclusive precedence and pedigree of actions; in modern parlance we



should say that they looked to form and he to substance. How far his views had gained acceptance over twenty-seven years may be measured by the decision in *Pykeryng v. Thurgoode*,<sup>30</sup> which represents the mirror-image of *Orwell*. A brewer complained that in the parish of St-Giles-without-Cripplegate the defendant, half the price having been paid beforehand, had bargained and sold forty quarters of malt to be delivered by the Feast of the Purification and that he then and there promised ("il promitt[a]") and took upon himself to deliver accordingly, so that the plaintiff made correspondingly less provision for malt from other sources. Intending to harm the plaintiff's brewing trade, the defendant failed to deliver, despite frequent requests, and in order to continue brewing after the date set, the plaintiff had to obtain malt elsewhere at inflated prices. A Guildhall jury directed by Fitzjames C.J. awarded the plaintiff damages, and when his judgment was sought to be arrested in Westminster, the King's Bench, by three to one, upheld the plaintiff's claim. Spelman J. led off by saying that as the plaintiff had suffered wrong through the breach of promise and undertaking, and damage through the non-delivery of the malt, the law gave him an action. The distinction between non-feasance and malfeasance, whereby the action of covenant lay for the one and the action on the case for the other, lacked reason. And it was irrelevant that the plaintiff could have had the action of debt, for that was founded on the *debet et detinet*, whereas the present action was founded on the defendant's wrong, breach of promise. Some of Spelman J.'s hypothetical refinements upon the doctrine of disablement verged on the obscure; but he emphasized clearly, with a reference to the converting bailee in *Bourgchier v. Cheseman*,<sup>31</sup> that the plaintiff could choose between the old and the new actions. Echoing his pronouncements, Coningsby J. and Fitzjames C.J. stressed the choice which the plaintiff was entitled to make. It was left to Port J. to express the conservative opinion; after integrating the promise into the bargain and sale he concluded that Thurgoode's inaction was remediable in detinue. Later, in the surety case of *Holygrave v. Knyghtsbrygge* (1535),<sup>32</sup> Port J. came round to Spelman J.'s view that the action on the case was lawful for the breach of promise to pay money.

Two averments catch our attention: Thurgoode's promise and Pykeryng's reliance thereon. In the sixteenth-century claim, the Latinate sequence of tenses separated the underlying transaction from the subsequent promise: the sale, for example, was narrated in the pluperfect, the promise in the perfect.<sup>33</sup> It became common form to allege deceit in the defendant, whether or not the facts disclosed machinations and a villain.<sup>34</sup> And the sum claimed was not the amount of the debt but the consequential loss flowing from the breach of promise: damage, say, to the house left unroofed in the

wind and the rain, or to the pocket and reputation of the retailer who disappointed his customers after his supplier had let him down.<sup>35</sup> Injurious reliance formed a most important element of the doctrine of consideration, itself the chief limitation upon the use of *assumpsit* for breach of parol agreements and contracts.<sup>36</sup> "About the middle of the sixteenth century pleaders began to explain how the promise or *assumpsit* had been made in an *in consideratione* clause, which set out the prepayment or *quid pro quo* or act done in reliance on the promise."<sup>37</sup> The courts also had to decide the effect of an exchange of promises. "In 1558 we find the famous words 'every contract executory is an *assumpsit* in itself', which suggest that the mediaeval 'contract' (of which sale and loan are typical) is now being interpreted as an exchange of promises. In 1589 the process is complete and the result clear: 'a promise against a promise will maintain an action upon the case'."<sup>38</sup>

The action of *assumpsit* could be applied to a wide range of contracts and created litigation that raised the King's Bench to the status of a commercial court<sup>39</sup> which made the action do the work of debt.<sup>40</sup> To a pre-existing debt would be added a legally presumed *assumpsit*.<sup>41</sup> But the Common Pleas, to fit the new action into the scheme of actions, required the promise to be proved and the damages to be awarded for loss other than the debt claimed.<sup>42</sup> Both courts had to bear in mind that the Chancellor was active in the realm of contract.<sup>43</sup> At law, the King's Bench could provide plaintiffs with utter barristers cheaper than the expensive old serjeants in the Common Pleas; quicker process; freedom from law wager; the means of suing executors; and the licence to surprise defendants by means of an *indebitatus assumpsit* so terse and general as to give no clue to the circumstances in which the promise was alleged to have been made.<sup>44</sup> The Common Pleas was alarmed by the insouciance of the King's Bench towards the proper sphere of debt,<sup>45</sup> and when the Statute 27 Elizabeth I, chapter 8 (1585),<sup>46</sup> instituted a statutory Exchequer Chamber composed of the Common Pleas justices and such barons of the Exchequer as belonged to the order of the coif, all met to hear appeals from the King's Bench sitting as a court of first instance, wrangles broke out in the 1590s in which the King's Bench would favour *assumpsit* but the statutory Chamber would reverse those decisions.<sup>47</sup> In 1597 began *Slade's Case*,<sup>48</sup> the discussion in which effectively confirmed the legitimacy of *assumpsit*. Slade complained that, at the special request of Morley, he had bargained and sold him the wheat and rye growing on Rack Park in Devon, and then and there Morley assumed and faithfully promised to pay £16 at the Feast of St John the Baptist; but payment, frequently requested, had not been forthcoming. By a special verdict an Exeter jury decided that there had been a

bargain and sale but no undertaking apart from the bargain; and so the issue was squarely raised whether the bargain and sale imported in itself an *assumpsit*. After the predictable clash between the two courts, and before delivery of judgment, Popham C.J., K.B. adjourned the matter for discussion in the old common-law Exchequer Chamber (an informal conference of all royal judges)<sup>49</sup> and subsequently in Serjeants' Inn. Of the points raised those which concern us at present were: (1) "Did a contract contain in itself an undertaking to perform the duty which it generated, even though the contracting parties did not use the words 'I promise' or 'I undertake'";<sup>50</sup> (2) was the plaintiff allowed to choose the action on the case when the debt, an action framed in the Register, was available?<sup>51</sup> From Baker's investigation into the numerous reports of the case it appears that no concerted set of rulings was ever delivered, but that the Common Pleas justices and the conservatives among the Exchequer barons somehow acquiesced in the approach taken by the King's Bench.<sup>52</sup> The answer to both the above questions was yes.<sup>53</sup> Free from law wager, more convenient than debt, *assumpsit* came to be preferred.<sup>54</sup>

As regards specific relief in respect of moveables, this outline of the history of trover and conversion and of *assumpsit* has traced their common origin in the action on the case, part of the law of trespass. Could specific relief be obtained in trespass actions? Pollock and Maitland declared: "[The defendant] also is condemned to pay damages. The action is not recuperatory; it is not *rei persecutoria*. ... Therefore the man whose goods have been taken away from him can by writ of trespass recover, not his goods, but a pecuniary equivalent for them...."<sup>55</sup> Milsom found special writs of trespass claiming specific relief<sup>56</sup> but said that in the course of the fourteenth century it was settled that this could not be had in trespass.<sup>57</sup> Consequently *assumpsit*<sup>58</sup> and trover and conversion<sup>59</sup> gave the plaintiff damages. If he wanted specific relief he had to turn to detinue where, as will be seen, he was long doomed to frustration.

#### Notes

1. *Supra* chapter 6.
2. BAKER, INTRO 264-6; 2 P. & M. 216-20; FIFOOT, H.S.C.L. ch. 11; PLUCKNETT, CONCISE HISTORY 365-6; SIMPSON, H.C.L.C. 9-47, esp. 22-5 (formality); MILSOM, H.F.C.L. 246-50.
3. MAITLAND, THE FORMS OF ACTION 55.
4. BAKER, INTRO 271; MILSOM, H.F.C.L. 315, 326-8.

5. Their early unconcern: GLANVILL, X.8, 18; 2 P. & M. 197; PLUCKNETT, CONCISE HISTORY 631, 637; BAKER, INTRO 265; MILSOM, H.F.C.L. 248.
6. MILSOM, H.F.C.L. ch. 12; BAKER, INTRO 273.
7. BAKER, INTRO 274.
8. Property: *e.g.*, Humber Ferry Case (1348), A.K.R. KIRALFY, A SOURCE BOOK OF ENGLISH LAW 187 (1957); Waldon v. Marshall (1369), FIFOOT, H.S.C.L. 81. Person: The Surgeon's Case (1375), FIFOOT, *id.*, 82. *See* AMES, LECTURES 130; MAITLAND, THE FORMS OF ACTION 55; 3 H.E.L. 430-1; PLUCKNETT, CONCISE HISTORY 637-8; SIMPSON, H.C.L.C. 210-5; BAKER, INTRO 274; MILSOM, H.F.C.L. 316-20.
9. Distinction between misfeasance and non-feasance: *see, e.g.*, Watton v. Brinth (1400) Y.B. 2 Hen. IV M. f. 3, pl. 9; 3 H.E.L. 433; SIMPSON, H.C.L.C. 221-7; BAKER, INTRO 275.
10. *Cf.* Stratton v. Swanlond (1375), KIRALFY, SOURCE BOOK, 185, 186, *per* Cavendish C.J., K.B.
11. MILSOM, H.F.C.L. 315, 326.
12. PLUCKNETT, CONCISE HISTORY 640-3; SIMPSON, H.C.L.C. 240-7, 253-8; MILSOM, H.F.C.L. 328-32.
13. FITZHERBERT, NEW NATURA BREVIVM, f. 217 (Writ de Disceit) (Ed. 1730); SIMPSON, H.C.L.C. 253-5.
14. Somerton v. Colles (1433), FIFOOT, H.S.C.L. 343; PLUCKNETT, CONCISE HISTORY 641; 3 H.E.L. 431-3; BAKER, INTRO 278.
15. BAKER, INTRO 277; SIMPSON, H.C.L.C. 203-7, 229-34; MILSOM, H.F.C.L. 325.
16. (1456) Y.B. 34 Hen. VI, M. f. 4, pl. 12; SIMPSON, H.C.L.C. 255; BAKER, INTRO 278.
17. SIMPSON, H.C.L.C. 256.
18. Shipton v. Dogge or Doige (1440-2), FIFOOT, H.S.C.L. 347; BAKER, INTRO 278-9; SIMPSON, H.C.L.C. 255 *et seq.*; 3 H.E.L. 435-9; MILSOM, H.F.C.L. 328-32; PLUCKNETT, CONCISE HISTORY 641-2.
19. SIMPSON, H.C.L.C. 258-9; PLUCKNETT, CONCISE HISTORY 642; BAKER, INTRO 279.
20. Milsom, 81 L.Q.R. 476, 510 (1965). *See* H.F.C.L. 328-32: in local courts and the City of London, the action of deceit claimed rescission of the agreement and restitution of payments made on the faith of that agreement. Defendants faced imprisonment pending repayment of the moneys. But the royal courts would not imprison defendants, and the restitutionary nature of the claim was obscured in damages awards.  
The disablement doctrine had parallels in sales of goods cases involving solus agreements: BAKER, Seld. Soc. 94, 276 and nn. 3, 4.
21. (1498) Y.B. 21 Hen. VII M. f. 41, pl. 66; SIMPSON, H.C.L.C. 260-2; BAKER, INTRO 279.
22. Simpson's qualifications: H.C.L.C. 261. Equity was active in this field: BAKER, Seld. Soc. 94, 267 and n. 6.
23. SIMPSON, H.C.L.C. 281.
24. Baker, [1971] C.L.J. at 219; SIMPSON, H.C.L.C. 283 *et seq.*

25. Anon, Dalison 9 (1553); 123 E.R. 232; Wade v. Braunche, 2 And. 53; 123 E.R. 541; SIMPSON, H.C.L.C. 286.
26. Other examples of *assumpsit* for non-feasance: SIMPSON, H.C.L.C. 264-6, 270-1; MILSOM, H.F.C.L. 339 *et seq.*
27. Cf. Tailbois v. Sherman (1443) Y.B. 21 Hen. VI f. 55, pl. 58; SIMPSON H.C.L.C. 262.
28. (1505) Y.B. 20 Hen. VII T. f. 8, pl. 18; KIRALFY, SOURCE BOOK, 150; FIFOOT, H.S.C.L. 351; SIMPSON, H.C.L.C. 262-4, 288-9; BAKER, Seld. Soc. 94, 276-7, INTRO 279.
29. SIMPSON, H.C.L.C. 260; FIFOOT, H.S.C.L. 338 n. 30.
30. J.H. BAKER, THE REPORTS OF SIR JOHN SPELMAN, Vol. I (Seld. Soc. 93) 4; Seld. Soc. 94, 247, 285-7; INTRO 283; SIMPSON, H.C.L.C. 269-70; MILSOM, H.F.C.L. 347.
31. (1504) Y.B. 20 Hen. VII M. pl. 13.
32. (1535) Seld. Soc. 93, 7; Seld. Soc. 94, 256, 258, 258; FIFOOT, H.S.C.L., 353, 339; SIMPSON, H.C.L.C. 291.
33. MILSOM, H.F.C.L. 347-8; Baker, [1971] C.L.J. at 214; Seld. Soc. 94, 273.
34. BAKER, Seld. Soc. 94, 274-5; MILSOM, H.F.C.L. 336-7.
35. BAKER, Seld. Soc. 94, 273-4, 280; MILSOM, H.F.C.L. 348, 335, 338, 343.
36. SIMPSON, H.C.L.C. 271-3, ch. VII; BAKER, Seld. Soc. 94, 286-97.
37. BAKER, INTRO 281; Seld. Soc. 94, 290-2; MILSOM, H.F.C.L. 357. Types of consideration: SIMPSON, H.C.L.C. 412-45.
38. Norwood v. Read, 1 Plowd. 180 (1558); 75 E.R. 276; Strangborough v. Warner, 4 Leo. 3 (1589); 74 E.R. 686; PLUCKNETT, CONCISE HISTORY 643-4. *See, too*, SIMPSON, H.C.L.C. 459 *et seq.*, esp. cases in 461 n. 1; Lücke, 81 L.Q.R. at 539-43 (1965).
39. BAKER, INTRO 283.
40. BAKER, *id.*, 284-5, quoting Coke in Anon (1587) H.L.S. MS. 116, f. 401v.; SIMPSON, H.C.L.C. 290-1; MILSOM, H.F.C.L. 345-6.
41. Edwards v. Burre, Dalison 104 (1573); 123 E.R. 310; Estrigge v. Owles, 3 Leon. 200, 201 (1588); 74 E.R. 632; PLUCKNETT, CONCISE HISTORY 644-5 (but *cf.* Lücke, 81 L.Q.R. at 551-61); 3 H.E.L. 443; MILSOM, H.F.C.L. 345-6, 350.
42. *Edwards*, *supra* note 41; FIFOOT, H.S.C.L. 359; PLUCKNETT, CONCISE HISTORY 645; MILSOM, H.F.C.L. 345-6, 350.
43. SIMPSON, H.C.L.C. 275-80; FIFOOT, H.S.C.L. 298 *et seq.*; Barton, 85 L.Q.R. at 377 (1969); MILSOM, H.F.C.L. 337.
44. BAKER, INTRO 285. *Indebitatus assumpsit*: MILSOM, H.F.C.L. 349; Manwood v. Burston, 2 Leon. 203, 204; 74 E.R. 479, 480; Hughes v. Rowbotham, Popham 30, 31 (1592); 79 E.R. 1150, 1151; SIMPSON, H.C.L.C. 304-5. K.B. process cheaper and speedier: PLUCKNETT, CONCISE HISTORY 645; SIMPSON, H.C.L.C. 292. Executors: Cleymond v. Vincent (1520) 12 Hen. VIII P. f. 11, pl. 3; BAKER, Seld. Soc. 94, 297-8. The high status of compurgation: PLUCKNETT, CONCISE HISTORY 115-6, 647; BAKER, [1971] C.L.J. at 228-30; SIMPSON, H.C.L.C. 298.
45. SIMPSON, H.C.L.C. 294; Baker, [1971] C.L.J. 215-20.
46. 27 Eliz. I c. 8 (1585) (2 STATUTES AT LARGE 640-1), as amended by 31 Eliz. I c. 1 (1589) (2 STATUTES AT LARGE 658-9).

47. *E.g.*, *Paramour v. Payne* (1595), *Maylard v. Kester* (1598), *Turges v. Beacher* (1595), reported in Moore 703, 711, 694 respectively, and in 72 E.R. 852, 857, 845; SIMPSON, H.C.L.C. 293; Baker, [1971] C.L.J. at 222-4.
48. *Slade v. Morley*, 4 Co. Rep. 92b (1597-1602); 76 E.R. 1074; Baker, [1971] C.L.J. 51-67, 227; FIFOOT, H.S.C.L. 359, 371; MILSOM, H.F.C.L. 351-3.
49. The common-law Exchequer Chamber: PLUCKNETT, CONCISE HISTORY 162-3, 188, 347-8; MILSOM, H.F.C.L. 351-2. The statutory Exchequer Chamber: PLUCKNETT, *id.*, 645, 171-2.
50. Baker, [1971] C.L.J. at 226.
51. PLUCKNETT, CONCISE HISTORY 645; SIMPSON, H.C.L.C. 295-6; MILSOM, H.F.C.L. 353.
52. Baker, [1971] C.L.J. at 230-6; INTRO 286 and n. 59; SIMPSON, H.C.L.C. 296-7.
53. (1): "3. It was resolved, that every contract executory imports in itself an *assumpsit*, for when one agrees to pay money, or to deliver any thing, thereby he assumes or promises to pay, or deliver it ... the mutual executory agreement of both parties imports in itself reciprocal actions upon the case, as well as actions of debt, and therewith agrees the judgment in *Read and Norwood's Case* [*supra* n. 38]: 4 Co. Rep. 94a, b; 76 E.R. at 1077.  
(2): "1. ... [A]lthough an action of debt lies upon the contract, yet the bargainer may have an action on the case, or an action of debt at his election....": 4 Co. Rep. 93a; 76 E.R. at 1075.
54. SIMPSON, H.C.L.C. 297-9; FIFOOT, H.S.C.L. 360; MILSOM, H.F.C.L. 354; PLUCKNETT, CONCISE HISTORY 647-8; BAKER, INTRO 286, [1971] C.L.J. 228-30.
55. 2 P. & M. 166-7; Maitland, 3 HARV. L. REV. at 178-9 (1889-90).
56. Milsom, 74 L.Q.R. 409-10, 422, 424-5, 432. *See* PLUCKNETT, CONCISE HISTORY 376 and n. 4.
57. Milsom, 74 L.Q.R. at 409-10. *See, too*, KIRALFY, THE ACTION ON THE CASE 3.
58. "4. It was resolved, that the plaintiff in this action on the case on *assumpsit* should not recover only damages for the special loss (if any be) which he had, but also for the whole debt, so that a recovery or bar in this action would be a good bar in an action of debt brought upon the same contract....": *Slade's Case*, 4 Co. Rep. 94b; 76 E.R. at 1077; SIMPSON, H.C.L.C. 309; *Robinson v. Bland*, 2 Burr. 1077, 1086 (1760); 97 E.R. 717, 722, *per* Ld. Mansfield C.J.; *Washington*, 47 L.Q.R. at 371-9 (1931); Lücke, 81 L.Q.R. at 423; 37 HALSBURY'S LAWS OF ENGLAND 71-2 (4th ed., 1982).
59. *Bishop v. Viscountess Montague*, Cro. Eliz. 824 (1601); 78 E.R. 1051; "The action in conversion ... results in a judgment for pecuniary damages only": *General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd.* [1963] 1 W.L.R. 644, 649 (C.A.), *per* Diplock L.J.; 3 BLACKSTONE, COMM. \*153; AMES, LECTURES 207; 37 HALSBURY'S LAWS 80; *Prosser*, 42 CORNELL L.Q. at 170 and n. 12 (1957); McGovern, 59 CALIF. L.R. at 1188 (1971).

## Chapter 9: The Detinue Judgment and the Defendant's Election

The plaintiff's frustration was provoked by another defect of detinue which we have saved for discussion till now. General opinion holds that, down the six centuries which separated Henry III from George IV, the common law on actions *in rem* for moveables remained substantially as expounded in Bracton's *Treatise*.<sup>1</sup>

Now we turn to movable things, a lion, an ox or an ass, a garment, or something reckoned by weight or measure. It seems at first sight that the action or plea ought to be both *in rem* and *in personam*, since a specific thing is being claimed and the possessor is bound to restore that thing. But in truth it will only be *in personam*, because he from whom the thing is sought is not bound to return the thing absolutely but disjunctively, to restore it or its value. By simply paying its value he is discharged, whether the thing itself is in existence or not. Thus if one vindicates his movable carried off for some reason or lent, in his action he must state its value and frame his action in this way, 'I, such a one, demand that such a one restore to me such a thing worth so much,' or 'I complain that such a one wrongfully detains from me (or 'has robbed me of') such a thing worth so much.' Otherwise, no value being named, the vindication of the movable will fail. The same will be true if movables reckoned by weight, number or measure are claimed, as goods in bulk, money, or grain, or others reckoned by liquid measure, as wine or oil. If goods of this sort are claimed it is sufficient if the defendant restores the equivalent in weight, number, kind and amount, and thus, since he is not compelled absolutely to the restitution of the thing sought the action will be *in personam*, since he may be discharged by the payment of an equivalent.

If the defendant neither delivered the chattel nor paid the plaintiff the value which the jury had set on it, the court ordered the sheriff to seize and sell enough of the goods in the defendant's possession as would realize the sum awarded, which would then go to the plaintiff.<sup>2</sup> This passage Maitland<sup>3</sup> praised as one of the boldest and most important in Bracton's *Treatise*: bold, for its contradicting Justinian's classification of actions in the *Institutes* 4.6.1 and 17.;<sup>4</sup> important, since it determined that for at least the next six centuries English law assigned a special meaning to the adjectives "real" and "personal" in relation to "action".

Bracton's rules should be seen in the context of his day. The typical chattel then was the beast-- "chattel" and "cattle" share an etymological root.<sup>5</sup> Destined for a short life, this animal was legally regarded as manifesting a high degree of fungibility with other members of its particular class. As Pollock and Maitland explain:<sup>6</sup>

Time was when oxen served as money, and rules native in that time will live on into later ages. The *pecunia* of Domesday Book is not money but cattle. When cattle serve as money, one ox must be regarded as being for the purposes of the law exactly as good as another ox. Of course a court may have to decide whether an ox is a good and lawful ox, just as it may have to decide whether a penny is a good and lawful penny; but, granted that two animals are legally entitled to the name of ox, the one in the eye of the law can be neither better nor worse than the other. It was by slow degrees that beasts lost their 'pecuniary' character. A process of differentiation went on within each genus of animals; the genus *equus* contains the *dextrarius*,<sup>7</sup> the *iumentum*,<sup>8</sup> the *palefridus*,<sup>9</sup> the *runcinus*.<sup>10</sup> All horses are not of equal value, but all palfreys are or may for many legal purposes be supposed to be, and the value of the destrier can be expressed in terms of rounceys. Rents are payable in oxen, sheep, corn, malt, poultry, eggs.<sup>11</sup> The royal exchequer has a tariff for the commutation of promised hawks and hounds into marks and shillings. We may expect therefore that the law of the twelfth and thirteenth centuries will draw no very sharp line between coins and other chattels; but this means that one important outline of our modern law will be invisible or obscure.

And at Cambridge Maitland lectured that<sup>12</sup>

the defendant when worsted is always allowed the option of surrendering the goods or paying assessed damages. The reason of this may perhaps be found partly in the perishable character of medieval movables, and the consequent feeling that the court could not accept the task of restoring them to their owners, and partly in the idea that all things had a 'legal price' which, if the plaintiff gets, is enough for him.

This option leads Bracton to say that there is no real action for chattels, and this sentence is the starting-point of the fashion which teaches us to say that goods and chattels are not 'real' but 'personal' property.

Since there cannot have been thriving litigation about lions, even amid the influx of foreign goods into England during the Crusades,<sup>13</sup> Bracton's reference is strange and striking and may rest on the resonance of scripture,<sup>14</sup> for this exotic royal feral was to be found in the armorial bearings of the King, the lord or the knight sooner than in his farm-yard.<sup>15</sup> Leaving aside this flourish, we ask what law applied to inanimate, longer lasting non-fungibles, the sort which might be expected to descend in families as heirlooms. "With the exception of armour, those things that were both costly and permanent were for the more part outside the ordinary province of litigation; books, embroidered vestments, jewelled crowns and crucifixes; these were safe in sanctuary or



in the king's treasure house; there was little traffic in them."<sup>16</sup> So the law on the effect of the detinue judgment took shape from the disputes most commonly before the King's justices.

Very many judges and jurists agree that because the defendant could choose between restitution and payment as modes of satisfying the judgment, detinue afforded the plaintiff no sure hope of regaining his chattel.<sup>17</sup> Though conceding the prevalence of this view, Fifoot<sup>18</sup> cited indications that the defendant's choice was not untrammelled: Glanvill,<sup>19</sup> *Wulghes v. Pepard*,<sup>20</sup> *Cadwodelegh v. John*,<sup>21</sup> Blackstone,<sup>22</sup> *Kettle v. Bromsall*.<sup>23</sup> Glanvill says that at the termination of a loan for use the borrower is bound to restore to the lender the thing if it still exists, but if it has perished or been damaged then the borrower must pay a reasonable price for it. If this means that the borrower is under an obligation to restore, it merely confirms the bailee's obligation; if that the borrower can be compelled to restore, then it conflicts with Bracton's opinion. About a century separated these two jurists, and in defence of the latter it may be argued that, in the former's time, detinue had yet to split from debt and damages could not be claimed.<sup>24</sup> But nearly half a century after Bracton, in *Wulghes v. Pepard*,<sup>20</sup> that perennial pest, he who borrows a book but does not return it, is ordered to do what the lender had so frequently requested. And in *Cadwodelegh v. John*,<sup>21</sup> however widely they may have differed about the action on the case for conversion, Choke J. and Brian C.J. agreed with Tremayle's contention that by the writ of detinue the thing itself could be recovered, Choke J. adding the rider that damages would be awarded if the thing could not be found. Blackstone<sup>22</sup> tells us that the detinue judgment "is conditional; that the plaintiff restore the said goods, or (if they cannot be had) their respective values, and also the damages for detaining them"; and he relies on Coke's *Book of Entries*<sup>25</sup> and *Peters v. Heyward*.<sup>26</sup> In *Eberle's Hotels and Restaurant Co. v. Jonas*,<sup>27</sup> Bowen L.J. approved the Blackstone quotation as the form of the detinue judgment at law and continued:

It is true that the defendant had the power, though not the right, to defeat the claim to the specific goods, and, in the event therefore of its being impossible for the plaintiff to get re-delivery of the specific goods, the judgment was in the alternative for their value. But the right of the plaintiff was always to the possession of the goods,<sup>28</sup> and to provide a remedy for this defect in the common law procedure s. 78 of the Common Law Procedure Act, 1854, was passed, which has been followed by Order XLVIII.,<sup>29</sup> to enable the judge to enforce delivery of the specific chattel detained. This provision does not, however, prove that the right of the plaintiff in an action

of detinue, whose property had been wrongfully detained, was not to the return of the chattels themselves.

As the plaintiff enjoyed a continuing right to the chattel detained, the executing sheriff was not allowed to distrain for the thing or for its value at his election, but should distrain for the thing itself and only for the damages if he could not have it;<sup>30</sup> indeed, in *Paler & Bartlet v. Hardyman*<sup>31</sup> a judgment was overruled which had allowed the plaintiffs an election between restitution and the value of the goods, for the value should not have been claimable unless the thing itself was not delivered. Further proof that the detinue judgment was primarily for restitution comes from the decision in *Eberle's Hotels*<sup>32</sup> that a detinue claim could not be reduced to a merely pecuniary claim for damages which would then permit an account and set-off under the mutual dealings provision in section 38 of the Bankruptcy Act 1883. Important, nevertheless, is Bowen L.J.'s acknowledging in the defendant a power to defeat the plaintiff's claim to the goods. It appears that, for the most part, the defendant's resolve to keep the goods constituted a valid reason for the impossibility of restitution-- provided that the weight of his money-bags tipped the scales of his rapacity. In *Ex parte Drake*<sup>33</sup> Jessel M.R. concluded that the judgments in *Brinsmead v. Harrison*,<sup>34</sup> especially Willes J.'s, showed the detinue judgment to be in theory a kind of involuntary sale of the plaintiff's goods to the defendant. The plaintiff who received their value lost his title to them. In the Manitoba Court of Appeal,<sup>35</sup> Trueman J.A. held that medals, pictures, and other pieces of antiquity could not be recovered in detinue at law if the defendant chose to pay their assessed value-- a ruling which militates against Fifoot's<sup>36</sup> interpreting *Kettle v. Bromsall*<sup>37</sup> to mean that Willes C.J. was prepared to grant specific restitution of those *objets d'art*-- but, even so, the judge of appeal observed that the defendant might be subjected to a damages award so stiff as to compel him to restore the chattel. This exclusion of the defendant's power was effected in *Hall v. White*.<sup>38</sup> The defendant having fraudulently led the plaintiffs to believe that he possessed the valuable letters and writings in dispute, Best C.J. left it to the jury to give such damages as would compel the defendant to deliver up the deeds, and the jury accordingly found their verdict in the sum of £450. This is perhaps what Willes C.J. would have brought about in *Kettle*. Otherwise the plaintiff might obtain specific relief in a more roundabout way that will bring a smile to the lips of those who relish paradox. Should the defendant fail to deliver or to pay, and the court order execution to issue, "the sheriff might actually sell the chattel in question to satisfy the plaintiff's damages, and, presumably, the plaintiff himself might attend the sale, bid successfully for the chattel, and pay the price to

himself through the hands of the sheriff".<sup>39</sup> However, this defect of detinue was unsatisfactory, and in the course of the great reforms carried out during the nineteenth century the nature of the judgment suffered considerable change.

#### A law commission and a procedure statute

As Bowen L.J. said in *Eberle's Hotels*,<sup>27</sup> section 78 of the Common Law Procedure Act 1854 was enacted to remedy a defect of detinue. It read:<sup>40</sup>

The court or a judge shall have power, if they or he see fit to do so, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and that if the said chattel cannot be found, and unless the court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, till the defendant render such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action.

These words concern detinue. Behind them lie a report and, as regards specific performance, a lost opportunity. In their Second Report on the Process, Practice, and System of Pleading in the Superior Courts of Common Law (1853),<sup>41</sup> the Royal Commissioners recommended that:<sup>42</sup>

courts of law ought to have power to grant specific performance, and to enforce the specific delivery of goods in every case in which that relief has hitherto been granted by courts of equity. This mode of procedure will be the same as in ordinary actions, with the exception that the plaintiff, by his declaration, will pay the specific relief instead of merely a sum of money. There are cases in which a court of equity, upon peculiar considerations of doubtful justice, grants specific performance though the legal right be not complete at the commencement of the suit. It may not be advisable to interfere with the jurisdiction of courts of equity in such cases, but only to give courts of law the power of enforcing specific performance in the same cases in which compensation in damages only can now be obtained in those courts.

These suggestions formed the basis of a clause about specific performance in the Second Common Law Procedure Bill 1854, the precise words of which can only be guessed at, because it forms no part of the bill recorded in *Parliamentary Papers 1854*, volume I,

Bill 123. When it was debated by the House of Lords<sup>43</sup> there was general agreement that it had been drafted too widely,<sup>44</sup> so that it would allow courts of law to award specific performance of breach of promise of marriage.<sup>45</sup> As to less extreme cases, where the remedy could usefully be granted in courts of law,<sup>46</sup> opinions diverged. One body of opinion, represented by Lord Chancellor Cranworth and Lord St Leonards,<sup>47</sup> disapproved of extending the chancery jurisdiction over specific performance to the courts of law<sup>48</sup> merely for the sake of pedantical completeness<sup>49</sup> when that remedy could already be had in chancery.<sup>50</sup> Two practical obstructions stood in the way of empowering courts of law to grant specific performance: lack of machinery<sup>51</sup> and of training.<sup>52</sup> First, in enforcing contracts for the sale of land, the sphere in which the remedy was most often granted, the courts must be able to investigate questions of title so as to be certain that the defendant could obey the court's order. As the courts of law lacked the means of conducting these investigations, they would have to be given them.<sup>53</sup> Secondly, the bench and bar of the courts of law lacked the training in equity which was needed for administering specific performance; the common-law bar affected an almost ostentatious repudiation of equity. Conferring the proposed powers would therefore lead to conflict of authorities and to confusion; the courts of law had to be remodelled and given the same means as the equity courts, through chief clerks and other officers, to make the necessary inquiries.<sup>54</sup>

The other view was advanced by Lord Chief Justice Campbell with support from Lord Brougham.<sup>55</sup> In the cases apart from breach of promise where specific performance might usefully be granted, its administration could safely be left to the judges: with many books to guide them, and the assistance of the officers of their courts, Lord Campbell C.J. and his fellows would manage investigations into questions of title.<sup>56</sup> The debate also ranged over many equitable institutions<sup>57</sup> and the advisability of fusing law and equity.<sup>58</sup> Lord St Leonards inveighed against any such unconsidered fusion.<sup>59</sup> Lord Campbell, for his part, urged the House to accept the convenience of having all aspects of a suit determined by one court, rather than leaving the litigant to trail to and fro between several courts in search of a just result.<sup>60</sup> In his journal Lord Campbell might preen himself that "[b]y remaining in town I have been of considerable service in the House of Lords, and particularly in getting through Parliament the great 'Procedure Bill of 1854,' which brings about, so far as is now practicable, the fusion of Law and Equity, and establishes the principle, on which our jurisprudence must henceforth be moulded, 'one court for one cause.'"<sup>61</sup> But the administrative reforms whereby specific performance could be granted by courts of law were introduced only by

the Judicature Acts seventeen years later, when the Queen's Bench Division of the High Court of Justice was empowered to grant legal and equitable remedies.<sup>62</sup>

As section 78 of the Common Law Procedure Act 1854 bears out, however, the resistance of the chancery lawyers to the extension of equitable powers to the courts of law was not adamant. Even Lord St Leonards supported the recommendation that those courts should be vested with the power to order specific delivery of chattels.<sup>63</sup>

### **The Mercantile Law Amendment Act 1856**

The Mercantile Law Amendment Act 1856 received its impetus from a conference of dissatisfied businessmen. In 1852, at Manchester and Glasgow, Birmingham and Leeds, and in large towns, they were complaining about the differences, in their opinion unreasonable, between Scots and English law concerning daily mercantile transactions, and they were petitioning for the two systems to be assimilated in this area.<sup>64</sup> In November, at its Regent Street offices in London,<sup>65</sup> the Society for Promoting the Amendment of the Law hosted a large gathering of delegates from the major centres of trade in the two countries and also some from Ireland, Lord Brougham chairing the first day's session and Lord Harrowby the second, to discuss the assimilation of English and Irish Law with the rather different Scots law in these mercantile matters. A delegation accompanied by Lord Harrowby<sup>66</sup> asked the First Lord of the Treasury, Lord Derby, to appoint a commission which would study the possible assimilation and make recommendations for its accomplishment. The Conservative government fell the next month; but the First Lord of the Treasury in the coalition of Peelites and Whigs, Lord Aberdeen, was approached and later issued a commission to a committee of lawyers and merchants.<sup>67</sup> The lawyers were Sir Thomas Berry Cusack Smith, Master of the Rolls in Ireland;<sup>68</sup> Mr Justice Cresswell, of the Common Pleas; John Marshall, Lord Curriehill; Baron Bramwell; Mr Anderson, K.C., admitted to practise in Scotland and England.<sup>69</sup> The businessmen were Mr Hodgson, President of the Glasgow Chamber of Commerce; Mr Bazley, President of the Manchester Chamber of Commerce; and Mr Slater, of perhaps the largest retailing company in the United Kingdom, Morrison & Co.<sup>70</sup> The commissioners decided to recommend only those assimilations which would either remove inconveniences actually experienced or reasonably foreseen in the contemporary mercantile laws, or which would improve the law of the respective countries clearly and with safety.<sup>71</sup> To apprise themselves as necessary they stated ninety-three prevailing differences in the laws<sup>72</sup> and circulated more than 500 of these statements among

lawyers and merchants, seeking advice on any other known differences and practical inconveniences in the contemporary law.<sup>73</sup> The list of recipients and respondents named in the report included judges of England, Scotland, and Ireland, as well as municipal, legal, and commercial bodies.<sup>74</sup> At the end of a year the commissioners reported the changes to the law which they considered desirable.<sup>75</sup> Point number 5 of these was the purchaser's remedy against the seller. Scots law was stated thus:<sup>76</sup>

The purchaser's remedy is to have implement of the contract by delivery of the goods, and damages for withholding delivery. If specific goods are sold, and in the possession of the vendor, the vendee may bring an action *ad factum praestandum* to enforce delivery.

But not if the vendor has become bankrupt; and in that case the vendee's claim resolves into a personal demand for damages, and he will be ranked along with other personal creditors on the bankrupt estate.

The English law the commissioners said was this:<sup>76</sup>

The purchaser cannot, in general, enforce delivery of the goods purchased *specifically*, and his remedy practically resolves itself into a claim for damages, whether he sues specially for non-performance of the contract, or brings an action of detinue for the goods themselves, or an action for the conversion of them.

The detailed comments of fourteen respondents were split up among and subjoined to each point of difference.<sup>77</sup> Of these persons, thirteen preferred the Scots rule; only one the English and Irish.<sup>78</sup> Although two learned societies in Scotland disagreed whether the differences between the English and the Scots rules had caused inconvenience,<sup>79</sup> and a Scots banker revealed his misapprehension of the workings of specific performance in England,<sup>80</sup> the Scots rule was variously deduced from general principles about the obligations of the contracting parties and the transfer of property in the thing sold;<sup>81</sup> restated in approval;<sup>82</sup> praised as giving a more complete remedy;<sup>83</sup> and declared as preferable, by way of terse statements and fuller commentary, by lawyers and laymen on both sides of the Tweed.<sup>84</sup> Most of these strands are tied together in the lengthiest commentary on point 5, which came from the Dean and Council of the Faculty of Procurators in Glasgow:<sup>85</sup>

Specific implement of a bargain, is surely better than allowing compensation for failure; and, where that can be given, the Scottish rule is, therefore, much more direct and simple. There are many cases in which a value attaches in

the purchaser's fancy to a specific article (*e.g.* a horse, a dog, or a piece of land in the case of heritage) which damages cannot measure; and while the article is extant and no competing claim for it, either by other purchasers or by general creditors in bankruptcy, there seems to be no reason why the article sold should not also be the article delivered. We think the purchaser should have the option of laying his action, either for implement or for compensation; but we would allow the seller to meet such action in either case by a tender of the article sold, provided there had been no such change of circumstances as to make its delivery valueless, or of less value to the purchaser.

In the case of bankruptcy, by which the whole estate is at once made a general fund, the test of possession will of course apply.

The adoption of the alternative of specific implement or compensation has an important bearing on the measure of damages for non-fulfilment-- See [Point of Difference] No. 11.

The dissentient group were businessmen who seem to have viewed the equity pleaders in their fair city with disdain. The Dublin Chamber of Commerce thought the English and Irish rule "less capable of being converted by special pleading into an instrument for defeating the just claim of the purchaser."<sup>86</sup> Without details of this alleged pettifoggery, we can only surmise that the chancery lawyers in the Four Courts were seen as rather too clever at raising defences to suits for specific performance.<sup>87</sup> The criticism is in any case a product of its time, for the complexities of special pleading no longer survive to test the lawyer and baffle the litigant.<sup>88</sup>

Following upon the points of difference and the detailed replies come the general replies.<sup>89</sup> On possible assimilation of the mercantile laws in the United Kingdom the opinions about the worth of the respective systems tend to divide along nationalistic lines,<sup>90</sup> the lawyers referring to the professional training and the different approach to the administration of law and equity.<sup>91</sup> The Irish lawyers show a marked disinclination to contemplate the assimilation of Irish law to Scots: the reverse process should take place if necessary,<sup>92</sup> and certainty should be valued above the amending of laws not demonstrably inconvenient.<sup>93</sup> A London solicitor observed, first, that English law seemed defective in not allowing the buyer to obtain possession of the goods bought, only damages (an editorial parenthesis reminds the reader of the innovations made by the Common Law Procedure Act 1854); and, secondly, that Scots law appeared illogical in entitling the buyer to specific delivery while denying all right of property until the delivery.<sup>94</sup> Thus the travails of that chameleon-hued word, "property."<sup>95</sup>

When the commissioners settled down to their report, they stated the law of Scotland<sup>96</sup> in slightly broader terms than had been submitted to the respondents for comment<sup>97</sup> or had formed the commissioners' more mature statement of the differences

between the remedies for specific enforcement of contracts in Scotland and England.<sup>98</sup>  
The crucial omission was the adjective "specific" as a qualification of "goods":<sup>96</sup>

If the seller fail to deliver the goods at the proper time, he may be sued by the buyer, according to the law of Scotland, to deliver those goods, and also to indemnify the latter for the loss, if there be any, occasioned to him by the delay; and the seller has not the option of paying the value of the goods, or damages for breach of contract, and withholding the goods themselves, if it be within his power to deliver them. The buyer has the alternative remedy either for performance of the contract, or for damages for breach of contract.

The commissioners then referred to the English and Irish common law on enforced delivery, damages being the general remedy, and to the changes wrought by section 78 of the Common Law Procedure Act 1854. They went on:<sup>96</sup>

We see no reason why a buyer of goods should not be entitled to compel the seller to perform specifically his obligation to deliver them in terms of the contract; or why, when such performance is in his power, he should have the option of contravening his engagement, and merely paying damages to the buyer. The Common Law Procedure Act affords a partial remedy in England; but it does not go far enough, and does not extend to Ireland. And we recommend that on this subject the laws of England and Ireland be assimilated to the law of Scotland.

Of course the assimilation had to take place within the framework of English and Irish law, the distinction between law and equity in which could not be undone simply for the sake of transplanting the law of Scotland. Still, eloquence yielded action. Bramwell B.<sup>99</sup> drafted a clause<sup>100</sup> which, except for sub-clauses making it apply to any court of record in England, Wales, or Ireland, passed unchanged into law as section 2 of the Mercantile Law Amendment Act 1856.<sup>101</sup> In clause form it attracted particular mention from the Lord Chancellor of Great Britain, Lord Cranworth, who restrained his condescension towards Scots law in general<sup>102</sup> sufficiently to commend the Scots rule. "In England," he said,<sup>103</sup> "if a man contracted to buy so many bales of cotton or bushels of wheat, and the seller failed to deliver them, the purchaser could only bring his action for damage for the breach of contract; but in Scotland the purchaser, as in the case of real estate in England, could obtain a decree that the specific goods, whether cotton or wheat, should be delivered, and, if the seller failed, then that he should make good the deficiency by damages." (Note that in 1856 Lord Chancellor Cranworth also decided the Scots appeal in *Dixon v. Bovill* which tended to confirm his illustrations about cotton and wheat.<sup>104</sup>) Section 2 ran:



In all actions and suits in any of the superior courts of common law at Westminster or Dublin, or in any court of record in England, Wales or Ireland, for breach of contract to deliver specific goods for a price in money, on the application of the plaintiff, and by leave of the judge before whom the cause is tried, the jury shall, if they find the plaintiff entitled to recover, find by their verdict what are the goods in respect of the non-delivery of which the plaintiff is entitled to recover, and which remain undelivered; what (if any) is the sum the plaintiff would have been liable to pay for the delivery thereof; what damages (if any) the plaintiff would have sustained if the goods should be delivered under execution, as hereinafter mentioned, and what damages if not so delivered; and thereupon, if judgment shall be given for the plaintiff, the court or any judge thereof, at their or his discretion, on the application of the plaintiff, shall have power to order execution to issue for the delivery, on payment of such sum (if any) as shall have been found to be payable by the plaintiff as aforesaid, of the said goods, without giving the defendant the option of retaining the same upon paying the damages assessed; and such writ of execution may be for the delivery of such goods; and if such goods so ordered to be delivered, or any part thereof, cannot be found, and unless the court, or such judge or baron as aforesaid, shall otherwise order, the sheriff, or other officer of such court of record, shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, or within the jurisdiction of such other court of record, till the defendant deliver such goods, or, at the option of the plaintiff, cause to be made of the defendant's goods the assessed value or damages, or a due proportion thereof; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs and interest in such action or suit.

Section 2 appears never to have formed the subject of litigation or of judicial analysis while in force. Day found no cases for the period from 1856 to 1872;<sup>105</sup> I have found none for that from 1873 to 1894, the date when the Sale of Goods Act 1893 came into force and by its schedule repealed section 2 of the 1856 Act. Therefore the most detailed commentary is probably in Day's fourth edition of *The Common Law Procedure Acts*.<sup>106</sup> The latter half of the section we may ignore, because the procedure whereby the plaintiff could use a writ of execution or of *distringas* as a means of persuading the defendant to deliver the goods is mentioned in shortened form in Chalmers's draft of the Sale of Goods Bill 1889<sup>107</sup> but not expressly in section 52 of the Sale of Goods Act 1893. More interesting is the first half of section 2 of the 1856 Act, which carries the words and phrases "specific goods," "on the application of the plaintiff," "at their or his discretion," "on the application of the plaintiff", which occur, sometimes in modified wording, in the Sale of Goods Acts 1893 and 1979. If the commissioners intended the assimilation of English and Irish law to Scots law in this area of mercantile law,<sup>108</sup> Bramwell B. omitted to limit the availability of the remedy in English and Irish law to situations where the defendant remained solvent, and the baron thus sowed the seeds of

the controversy in *Re Wait*.<sup>109</sup> Treitel says that the adjective "specific" was taken from Scots law,<sup>110</sup> and as some uncertainty exists over its scope in that system,<sup>111</sup> we shall have to trace its origin in the case law.

### Notes

1. BRACTON, TREATISE, f. 102b (Vol. 2, 292-3).
2. 2 P. & M. 174; Jenks, 49 L.Q.R. 215, 217 (1933); BAKER, INTRO 328.
3. F.W. MAITLAND, SELECT PASSAGES FROM THE WORKS OF BRACTON AND AZO (Seld. Soc. 8), 172-3.
4. Maitland, *id.*, does not cite specific references in the INST. JUST., but 4.6.1. and 17. appear relevant. Cf. also, DIG. JUST. 44.7.25.pr., 28; and GAIUS, INST. 4.2.3.; F. SCHULZ, CLASSICAL ROMAN LAW 32 *et seq.* (1950); C.G. VAN DER MERWE, SAKEREG 41 (1979).
5. 2 O.E.D. 190-1 ("cattle"), 302-3 ("chattel").
6. 2 P. & M. 151. Cf. MILSOM, H.F.C.L. 262: "In a society in which the main chattels were beasts and grain, the distinction between specific and unascertained goods, though not unintelligible, would not be important."
7. *Dextrarius*, destrier in Old French; "The war-horse, or charger, so called from being led by the knight's squire with his right hand": 3 O.E.D. 260; 3 DU CANGE, GLOSSARIUM MEDIAE ET INFIMAE LATINITATIS 92 (L. Favre (ed.), 1884). Writing about the Norman *miles* or knight, M. POWICKE, THE THIRTEENTH CENTURY, 1216-1307 549 (1953): "His great warhorse or *dextrarius*, worth anything from £40 to £80, was his most precious possession, a source of pride and anxiety, as well known by name and qualities as he was himself, worth, indeed, his own daily wages for from seven to fourteen months or more." For values of the respective breeds of horse, cf. H.J. HEWITT, THE HORSE IN MEDIEVAL ENGLAND 7 (1983), a book impaired by an absence of critical apparatus but still interesting.
8. *Iumentum*: "An animal used for pulling or carrying, beast of burden (usu. of mules or horses etc., as opposed to cattle)": O.L.D. 981; cf. Pomponius's distinction, DIG. JUST. 50.16.89; 4 DU CANGE, GLOSS. MED. ET INF. LAT. 447, which also translates it as "mare", a usage reflected in French "jument"; see, also, 5 O.E.D. 627, s.v. "Jument."
9. *Palefridus*, the palfrey: Y. LEFÈVRE, *Fasc. P-Panis*, in NOVUM GLOSSARIUM MEDIAE LATINITATIS AB ANNO DCC USQUE AD ANNUM MCC 96 (1980); "A saddle-horse for ordinary riding as distinguished from a war-horse, esp. a small saddle-horse for ladies": 7 O.E.D. 393. It was very often the clergy's horse: LEFÈVRE, *id.*, cf. the Monk on his berry-brown palfrey in G. CHAUCER, PROLOGUE TO THE CANTERBURY TALES 207. For values, cf. LEFÈVRE, *id.*
10. *Runcinus*, the rouncey: "A horse, esp. a riding horse": 8 O.E.D. 820. It was pre-eminently the squire's horse, while the palfrey was the knight's: 7 DU CANGE, GLOSS. MED. ET INF. LAT. 240. Cf. the Shipman on his rouncey in CHAUCER, PROL. 390.

11. And honey: see Dr E.M. Hallam's letter to *The Times*, Apr. 23, 1986, p. 17: In Domesday England "in 20 counties manorial rents were sometimes paid not in cash but in sesters of honey." See, also, G. DUBY, *THE EARLY GROWTH OF THE EUROPEAN ECONOMY* 23 (H.B. Clarke (tr.), 1974).
12. MAITLAND, *THE FORMS OF ACTION* 50; also 38, 58, 60-1. The distinction between real and personal actions was adopted by T. Littleton in his treatment of releases in book III, chapter 8 of his *TREATISE ON TENURES*; PLUCKNETT, *CONCISE HISTORY* 376.
13. Influx of foreign goods: cf. the long-tailed apes included in the menagerie taken by Henry II's chancellor, Thomas Becket, when he travelled on embassy to Louis VII of France in 1158: William FitzStephen, *Vita Sancti Thomae Cantuariensis Archiepiscopi et Martyris*, in 3 *MATERIALS FOR THE HISTORY OF THOMAS BECKET* 31 (J.C. Robertson (ed.), 1877).
14. Besides being a lawyer, Bracton was also a priest. "In 1259 he became rector of the Devonshire parish of Combe-in-Teignhead, in 1261 rector of Bideford, in 1264 arch-deacon of Barnstaple, and in the same year chancellor of Exeter cathedral": 1 P. & M. 206; MAITLAND, *Seld. Soc.* 8, x and n. 2. The lion was found in the Holy Land and is mentioned frequently in the Bible. See the refs. in R.L. THOMAS, *NEW AMERICAN STANDARD EXHAUSTIVE CONCORDANCE OF THE BIBLE* 722-3 (1981). There seems no serial collocation of the lion, the ox, and the ass. A reasonably close collocation might be *Job* 38:39 (lion); 39:5 (wild ass); 39:9 (wild ox), if one accepts the translation of the NEW ENGLISH BIBLE, the compilers of which took particular care over translating passages referring to wild animals. The doubtful passage might be 39:9, which the AUTHORIZED KING JAMES VERSION renders as "unicorn." The original Hebrew is רֶמֶם, "rêm," and the Greek translation is μονόκερως, which makes it clear that some single-horned animal is meant. (I am indebted to Professor Emeritus George Anderson for help with the Hebrew and Greek words.) There are several pairings of the lion with each of the other two animals: e.g., lion-ox: *Isa.* 11:6, 7; 65:25; *Ezek.* 1:10, 10:14; 1 *Kings* 7:29. Lion-donkey: e.g., 1 *Kings* 24, 28; *Isa.* 30:6. Ox-donkey, very numerous: e.g., *Gen.* 12:16, 32:5, *Exod.* 20:17, 21:33; 22:4, 9; 23:4, 12; *Josh.* 7:24; *Deut.* 5:14, 21; 22:4, 10; *Judg.* 6:4; *Isa.* 32:20; *Luke* 13:15; 1 *Sam.* 22:19; *Job*, 1:3; 42:12. There is no internal evidence from BRACTON f. 102b that the author was quoting the Bible. But that the idea is not wholly fanciful is suggested by Maitland's remark that among the books at Bracton's elbow in the composition of his treatise was a well-read Bible: *Seld. Soc.* 8, xxv.
15. Exotic: Lions were not always exotic to England. 1 W.B. DAWKINS & W.A. SANDFORD, *BRITISH PLEISTOCENE MAMMALIA* (1868) examined the fossil remains of *Felis spelaea* (Goldfuss), an animal "specifically identical with the Lion now living on the face of the earth" (150). Cave lion lived in the Northern and West-European caves during the post-glacial period (*id.*) It was not found in Scotland (151), perhaps because the glaciers on the mountains would have rendered the climate inimical to the herbivores needed to support it (156). Its British locus was the western half of the Mendip hills, Somerset (153). Referring to ancient authors, the two palaeontologists concluded that "the Lion had deserted Europe before the end of the first century after Christ" (167). We may safely assume that no wild lions roamed England when Bracton wrote his treatise. For an outline of animals wild and domestic between 1150 and 1400, see H.S. BENNETT, *LIFE ON THE ENGLISH MANOR* 89-96 (1937).  
 Lions in armorial bearings: O. Barron, *Heraldry*, in 13 *ENCYCLOPAEDIA BRITANNICA* (11th ed., 1910): "The book of natural history as studied in the



- (4th ed., 1958); 38 HALSBURY'S LAWS 802-3 (3d ed., 1962); Jones, [1963] C.L.J. 206; Goodhart, 80 L.Q.R. 8, 9 (1964); 18th Report of the Law Reform Committee 1971 (Cmnd. 4774); J.F. CLERK & W.H. B. LINDSELL, TORTS 719 (14th ed., 1975); BAKER, Seld. Soc. 94, 264 and n. 6; SALMOND & HEUSTON, TORTS 103-4, 126-7; CHALMERS' SALE OF GOODS ACT 1979 28 (18th ed., 1981); J.G. FLEMING, THE LAW OF TORTS 67 (1987); WINFIELD & JOLOWICZ, TORT 474-5; R.W.M. DIAS & B.S. MARKESINIS, TORT LAW 215 (1984).
18. FIFOOT, H.S.C.L. 109 n. 44, 25 n. 8.
  19. *Id.*, esp. 109; the form of words in n. 44 signals GLANVILL X.13; *cf.* the marginal note in CO. LITT. 286b (Sect. 498).
  20. (1310) Y.B. 4 Edw. II (Seld. Soc. 26, 14); FIFOOT, H.S.C.L. 37.
  21. *Supra* chapter 7 and n. 41.
  22. 3 BLACKSTONE, COMM. \*152.
  23. Willes 118 (1738); 125 E.R. 1087.
  24. *See* p. 258 of G.E. Woodbine's 1932 edition of GLANVILL; 2 P. & M. 173-4; Woodbine, 33 YALE L.J. at 802-11 (1923-4). In his edition, Woodbine appears to side with the majority that the defendant could always choose between restitution and payment: "This rule that the bailee must return the *res* or its value was the rule that later obtained in the action of detinue."
  25. E. COKE, A BOOK OF ENTRIES 170 (1671), noting *Fawcet v. Barber*, H. 5 Jac. Rot. 447 in communi banco: sur trover dun chival: esp. "si eam rehabere non possit."
  26. Cro. Jac. 682 (1623); 79 E.R. 591.
  27. (1887) L.R. 18 Q.B.D. 459, 468-9 (C.A.). *See*, also, *Ld. Esher M.R.*, 466; *Fry L.J.*, 469.
  28. *Cf.* Littleton's words in Sect. 498: "Also if I have any cause to have a writ of detinue of my goods against another, albeit that I release to him all actions personals, yet I may by the Law take my goods out of his possession, because no right of the goods is released to him but only the action, etc.": CO. LITT. 286b.
  29. R.S.C. Ord. XLVIII, r. 1: CHITTY'S ARCHBOLD'S PRACTICE OF THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE 904 (14th ed., 1885): "This rule corresponds with the 78th section of the *Com. Law Proc. Act*, 1854, and is in almost identically the same terms. That section is repealed by the *Stat[ute] Law Rev[ision] and Civil Proc[edure] Act*, 1883 [(46 & 47 Vic. c. 47, as amended)]."
  30. *Peters v. Heyward*, *supra* note 26, at 683; 592.
  31. *Yelv.* 71 (1605); 80 E.R. 49.
  32. (1887) L.R. 18 Q.B.D. 459.
  33. (1877) 5 Ch. D. 866, 871 (C.A.).
  34. (1872) L.R. 7 C.P. 547.
  35. *McIntyre v. Brodie* [1933] 3 D.L.R. 297, 300.
  36. FIFOOT, H.S.C.L. 109.
  37. Willes 128; 125 E.R. 1087.
  38. 3 Car. & P. 134 (1827); 172 E.R. 357.

39. Jenks, 49 L.Q.R. 215, 217 (1933).
40. S. 78, Common Law Procedure Act 1854 (17 & 18 Vict. c. 125).
41. 40 PARLIAMENTARY PAPERS 1852-3 REPORT [1679] 1. (I adopt the printed pagination in the Parliamentary Papers, rather than the manuscript pagination arranged for the House of Commons, the print being frequently the more legible.) The Royal Commissioners were Jervis, C.J., C.P.; Martin, B.; Walton, Master of the Excheq. Ct.; Bramwell, K.C.; Willes; Cockburn, A.-G.
42. *Id.*, 42.
43. See HANSARD'S PARLIAMENTARY DEBATES (3rd Series), Vols. 130-3 (1854). Hence these are abbreviated to H.P.D.
44. L.C. Cranworth, 130 H.P.D. col. 1342 (1st Reading); L.C.J. Campbell, *id.*, col. 1347, 131 H.P.D. col. 1261 (2d Reading).
45. L.C. Cranworth, 130 H.P.D. col. 1342, 131 H.P.D. col. 1258; L.C.J. Campbell, 130 H.P.D. cols. 1347-8.
46. L.C. Cranworth, 131 H.P.D. col. 1258.
47. L.C. Cranworth and Ld. St Leonards shared a professional background of chancery practice: 16 H.E.L. 40 (Ld. St Leonards), 57 (L.C. Cranworth).
48. L.C. Cranworth, 130 H.P.D. col. 1342; Ld. St Leonards, 131 H.P.D. col. 1262.
49. L.C. Cranworth, 131 H.P.D. col. 1259.
50. L.C. Cranworth, 130 H.P.D. 1342, 131 H.P.D. col. 1259.
51. L.C. Cranworth, 131 H.P.D. col. 1259; Ld. St Leonards, 131 H.P.D. col. 1261-2, 133 H.P.D. col. 792.
52. Ld. St Leonards, 133 H.P.D. col. 791-2.
53. Ld. St Leonards also deplored the suggestion of extending to the equity courts the jurisdiction to award damages: 131 H.P.D. col. 1262.
54. Ld. St Leonards, 133 H.P.D. col. 790, 792.
55. L.C.J. Campbell, 130 H.P.D. col. 1347-8, 131 H.P.D. col. 1261; Ld. Brougham, 131 H.P.D. col. 1262.
56. L.C.J. Campbell 131 H.P.D. col. 1261, 1262. Lord Campbell was making no idle boast. By training he was an outstanding exponent of the common law (15 H.E.L. 405 *et seq.*): pupil in special pleading (*id.*); reporter of *nisi prius* cases (*id.*, 406); leader of the common-law bar (*id.*, 407); Lord Chief Justice of the Queen's Bench (*id.*, 424 *et seq.*). He was Lord Chancellor of Ireland for six weeks (*id.*, 409), but his real education in equity began when in 1859, aged 79, he was elevated to the Woolsack by Lord Palmerston. He qualified himself in the vacation by looking over the previous ten years of equity reports (2 LIFE OF JOHN, LORD CAMPBELL 383 (M.S. Hardcastle (ed.), 1881), then "I sat daily through the whole of the Michaelmas Term with the Lords Justices Knight Bruce and Turner. I might have been compared to a wild elephant being broken in between two tame ones. My associates were the two most experienced Equity lawyers in Westminster Hall" (2 LIFE 384). He later sat alone to hear cases in Lincoln's Inn (2 LIFE 385), and although his impact on the development of equity was small (16 H.E.L. 69), and his criticisms of the length of Page Wood V.-C.'s judgments gave some offence for a time to his colleagues in equity, he earned high praise from Ld. St Leonards for his presiding over the House of Lords and the Court of Chancery (15 H.E.L. 510-1).
57. Ld. St Leonards, 133 H.P.D. cols. 790-2; L.C.J. Campbell, 133 H.P.D. col. 1149-50 (3d Reading).

58. L.C. Cranworth, 130 H.P.D. col. 1343; *Ld. St Leonards*, 133 H.P.D. 789, aspersing the fusion of law and equity in Scotland and the tendency to numerous appeals to the House of Lords; retort from that son of Cupar, Fife, who was trained in English law, L.C.J. Campbell, 133 H.P.D. 1149.
59. 133 H.P.D. col. 791-2.
60. L.C.J. Campbell, 133 H.P.D. cols. 1148-50.
61. 2 LIFE OF JOHN, LORD CAMPBELL 324-5.
62. Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 66) s. 3, as amended; s. 24(1), (7). The current provision is the Supreme Court Act 1981 (c. 54), s. 49, esp. (2).
63. 133 H.P.D. cols. 789-90.
64. 140 H.P.D. col. 1394, L.C. Cranworth.
65. For the address of the Society for Promoting the Amendment of the Law, *see* 18 PARLIAMENTARY PAPERS (1854-5): [1977] MERCANTILE LAWS, SECOND REPORT, 126.
66. Formerly Sir Dudley Ryder, Lord Harrowby was Lord Privy Seal in the Conservative Government of Lord Derby: DEBRETTS' PEERAGE AND BARONETAGE 570 (C. Kidd & D. Williamson (eds.), 1985).
67. 140 H.P.D. col. 2034-5, *Ld. Brougham*. The signature on the Royal Commission printed at 18 P.P. 1854-5 4 is that of Lord Palmerston, then Secretary of State for the Home Office.
68. Smith, M.R.I., had in 1852 anonymously published a pamphlet on reforms of the common law and chancery procedure and the transfer of land. The second edition issued under his name in 1863: LAW REFORM v-vi. He drew many comparisons with U.S. law.
69. Admitted to the Bars of Scotland and England: W. POWELL, THE LAW LIST 1852 5.
70. L.C. Cranworth, 140 H.P.D. cols. 1394-5.
71. 18 P.P. 1854-5 5.
72. 18 P.P. 1854-5, App. A., 41-109.
73. *Id.*, 5.
74. *Id.*, 37-9.
75. L.C. Cranworth, 140 H.P.D. col. 1395.
76. 18 P.P. 1854-5 46.
77. *Id.*, 41 *et seq.*
78. *Id.*, 46-7.
79. The Faculty of Advocates of Scotland: no inconvenience experienced from the difference between Scots and English law of specific enforcement of contracts; The Society of Writers to H.M. Signet: some inconvenience experienced from the lack of proper remedies in English law: *id.*, 46.
80. A. Blair, Treasurer of the Bank of Scotland, thought that the pursuer's remedy did not seem to differ in effect from the plaintiff's except in the case of bankruptcy: *id.*, 47. This view is in some respects erroneous, as will be shown.
81. The Society of Solicitors before the Supreme Court for Scotland: *id.*, 46.
82. L. Levi, Lecturer in Commercial Law, King's College, London: *id.*, 47.





102. "[T]hough he thought them [the laws of the Scotland] generally not so good, he was ready to admit that in some respects they were better than those of England": 140 H.P.D. col. 1394.
103. 140 H.P.D. col. 1397.
104. *See infra* chapter 10, pp. 207-8.
105. J.C. DAY, THE COMMON LAW PROCEDURE ACTS 393 (4th ed., 1872).
106. *Id.*, 392-3.
107. CHALMERS, THE SALE OF GOODS 81 (1890).
108. *Cf. id.*
109. [1927] 1 Ch. 606 (C.A.); Treitel, [1966] J.B.L. at 217.
110. [1966] J.B.L. 217; VII INTERNATIONAL ENCYCLOPAEDIA OF COMPARATIVE LAW, c. 16, p. 22 (1976).
111. GLOAG, CONTRACT 656 and W.M. GLOAG & R.C. HENDERSON, INTRODUCTION TO THE LAW OF SCOTLAND 117 (6th ed., 1956), 143, 215 (9th ed., 1987) *versus* J.J. GOW, THE MERCANTILE AND INDUSTRIAL LAW OF SCOTLAND 218-9 (1964): Treitel, [1966] J.B.L. 217.

**Chapter 10: Section 52 of the Sale of Goods Acts 1893 and 1979:  
the Nineteenth Century until 1881**

In chapters 10 to 14 we turn to discuss the Scots cases. Gloag<sup>1</sup> and Walker<sup>2</sup> between them rely on *Sutherland v. Montrose Shipbuilding Co.*,<sup>3</sup> *Purves v. Brock*,<sup>4</sup> *Henry v. Morrison*,<sup>5</sup> *Davidson v. Macpherson*,<sup>6</sup> *Union Electric Co. v. Holman*,<sup>7</sup> *Aurdal v. Estrella*,<sup>8</sup> *Munro v. Balnagown Estates Co. Ltd.*,<sup>9</sup> and *Mackay v. Campbell*.<sup>10</sup>

**Sutherland v. Montrose Shipbuilding Co.**

On 13 May, 1856, Petrie, who was an officer of the defending company, made Sutherland a written offer to build a schooner, the *Maria*. The price would be paid in instalments, £200 in cash on the laying of the decks, £500 on the launching, and the balance by approved bill at six months. Launching would take place in January 1857. Two days after receiving the offer, Sutherland accepted. The *Maria* was in fact launched three months late, on 27 March, 1857. Her cabin and other fitments completed while her cargo was being loaded, she sailed on 21 April. In March 1858 Sutherland sued for decree for £70 and interest as damages for loss resulting from the company's failure to complete and launch the ship in accordance with the contractual terms of 13 May, 1856. Damages comprised the general fall in freights, the particular fall in freights for the voyage planned, and the consequent disarrangement of the *Maria's* schedule. The company pleaded that the late delivery was nevertheless both a delivery and an acceptance accompanied by a bill for the balance of the price. (The first instalment had apparently been paid at the agreed stage of the construction.) As delivery had been taken, and arrangements made without complaint in March, implement of the company's obligation was complete, and the damages claim for late delivery was incompetent.

In his leading judgment, Lord Cowan held:<sup>11</sup>

It may be, that in a sale of goods or commodities generally, where delivery is not made at the time specified in the contract, the remedy of the purchaser is to claim damages calculated on such principles, as with due regard to the market price at the time, and place of delivery, will secure complete indemnity to the purchaser. Specific implement, in such a case, may not be claimed, and is not necessary to enable the buyer to place himself in the position he would have been in had delivery been made in terms of the contract. It is different where the contract relates to some specific thing or article; for then the obligation to deliver will be enforced; and, accordingly, Mr Addison states the law thus,-- "Wherever the object of sale is such that there is an uncertainty whether the purchaser can procure another chattel of the same kind and value, or the possession of it is desirable for certain purposes, which

no other chattel of the same kind will answer, a specific performance will be decreed."-- Addison on Contracts, p. 265.

Lord Cowan went on to hold that Sutherland was clearly entitled to insist for delivery of the finished ship ready to be launched. Each buyer of a specific thing-- a horse, a house, a piece of furniture-- could legally enforce delivery; the seller was not allowed to ignore the duty to deliver and so force the buyer to claim damages.

*A fortiori* is this principle true, in the case of a ship contracted to be built, and the price of which is payable in instalments. In such contract there is room ... for the principle to the extent of the instalments as paid. The personal right to the property in the vessel on the stocks vests in the purchaser; so that, in obtaining delivery when the vessel is ultimately finished, he receives in full property only a subject for which he has been paying a price by instalments, and to which he has already acquired, so far at least, a joint-interest and personal right.<sup>11</sup>

The judge then decided that as the buyer could insist for delivery, so could he claim damages for loss suffered through late delivery. M.P. Brown,<sup>12</sup> Pothier,<sup>13</sup> and Stair<sup>14</sup> were invoked as authority. The evidence of Sutherland was preferred to that of the defenders, and damages were ordained.

What did the case decide? Numerous and subtle as the rules of precedent may be, for present purposes Walker's theory of relevancy suffices:<sup>15</sup> a legal proposition applicable to a set of circumstances forms the major premise, the pursuer's averment that his case fits those circumstances forms the minor premise, and the pursuer's entitlement to the benefit of the principle forms the conclusion.

Any pursuer X, in circumstances where he has bought a specific thing from Y which Y refuses to deliver, is, as against the defender Y, entitled to specific implement. My client Sutherland is in the circumstances where the Montrose Shipbuilding Company refuses to deliver the *Maria* which he bought from the company. Therefore he is, as against the company, entitled to specific implement.

At this the company's officers might have snapped: "You got the ship late but you got it." A defender may attack the major premise's principle as irrelevant because it is unsound in law, or, though generally sound, is inapplicable to the present parties, or is inapplicable to the rest of the facts in the condescence.<sup>16</sup> In *Sutherland* it hardly matters whether we say that the defender could have pleaded delivery already made, or,

better still, that the pursuer had never sued for delivery anyway. Although Lord Cowan seems to have used specific implement as an approach to the main ground of the judgment, damages for delay, a pursuer's claim for *lucrum cessans* can exist independent from that for specific implement:<sup>17</sup> the result in *Sutherland* would have been the same even if specific implement had gone unmentioned. So the reasoning upon a claim which was never made, for delivery of what had already been delivered, must be *obiter*.

Within these *obiter dicta* the remarks on shipbuilding contracts need amplification for the relevance of specific implement to emerge. "A *fortiori*" is such convenient shorthand. In 1860 the Scots common law affirmed the Civil law that delivery was required for the transfer of ownership in corporeal moveables: *Traditionibus, non nudis pactis, dominia rerum transferuntur*.<sup>18</sup> The sale contract could not serve as a conveyance.

To this rule a contract for the sale in Scots law of a thing either to be manufactured or in the course of manufacture raised a gritty exception. It assumed, as Brodie<sup>19</sup> observed, that

the thing, as it stands passes by an immediate sale, and that there is then a separate contract by which the vender is under an obligation to finish it in a different capacity,— that of a person engaged to complete with work and materials an incipient thing, the property of another.

An indivisible contract of sale thus divided into a sale and conveyance of the principal thing, and a separate *locatio conductio operis faciendi* under which accessories were affixed. At Scots common law the exception, alluded to in *Sutherland*, rested mainly on the precedent of *Simpson v. The Creditors of Duncanson*,<sup>20</sup> the reports of which reveal just enough detail to sow confusion about the *ratio decidendi*. A buyer contributed the masts and other materials to the hull which the shipbuilder would make from his own materials, on the terms that payment of the three instalments of the price would correspond with keel-laying, planking, and launching. The buyer paid the first; the builder then went bankrupt. The trustee claimed ownership of the subsequently completed vessel for the estate, and the first instalment for behoof of the general creditors, who included the buyer. The clash of opinions discernible in Lord Hailes's report recedes when one studies Lord Monboddo's account in the Faculty Reports and Morison's Dictionary:

The determination of the case was thought by the judges to depend, not so much on general principles of law, as on the special terms of the agreement. By these the employer was to pay the price in different portions. Before payment, however, he had a right to see the work so far properly performed. Thus, as the builder proceeded, such an appropriation took place, as prevented his creditors from attaching the ship without refunding the sums advanced.

The impulse of the decision was policy.<sup>21</sup>

What interest did the buyer acquire here-- ownership, or an immunity<sup>22</sup> from attachment of the incipient thing? If the latter, whence was it derived? Lord Ardmil-lan<sup>23</sup> and Bell<sup>24</sup> characterize *Simpson* as an example of constructive delivery; Lord Justice-Clerk Moncreiff,<sup>25</sup> Lords Neaves,<sup>26</sup> Young,<sup>27</sup> and Gifford,<sup>28</sup> together with Bell,<sup>29</sup> are clear that the right transferred is property in the thing sold. Unlike actual delivery in that the thing itself is not physically handed over, constructive delivery took three forms in Roman law: *traditio longa manu*, *traditio brevi manu*, and *constitutum pos-sessorium*.<sup>30</sup> The last applies to *Simpson*: having received the first instalment, Duncan-son transferred property in the hull and retained mere detention of it, by agreement with and on behalf of Simpson, in order to finish the vessel.

In the conflict between the *traditionibus* rule and the idea of *constitutum possessorium*, the latter threatens the very existence of the former if extended too far. The most refined form of constructive delivery,<sup>31</sup> *constitutum possessorium* appears in classical Roman law to have operated when the *constituens* detained upon a specific title (*causa detentionis*) which was more than a bare agreement to hold something for another person,<sup>32</sup> and which was therefore the cause of or background to the holding. Besides this causal *constitutum* there seemed to lie in the wording of *Digest* 41.2.18.pr., as read with *Digest* 41.2.17.1, the possible inference of an abstract *constitutum*, by which the *constituens* merely declared himself *detentor* for someone else, without a contract to stand as cause or background.<sup>33</sup> The Glossators recognized both the causal<sup>34</sup> and the abstract version.<sup>35</sup> The severest pressure upon the *traditionibus* rule was exerted during the time of the Commentators: approving both forms, these jurists expanded the abstract *constitutum* and declared that the formula "*Constituo*" or "*Confiteor me tuo nomine possidere*" would suffice to transfer possession and ownership; and some ventured to imply a *constitutum* into a document.<sup>36</sup> Fiction approximated to fact; fraud was the result. For example, constructive delivery to one man by abstract *constitutum* would render suspect the subsequent delivery of the thing itself to a deluded second man.<sup>37</sup> It is no surprise that *constitutum* has ever since been examined for the taint of simulation. Yet it remained a convenient mode of transfer: in France it helped to establish the rule that the obligation

to deliver something is completed by the mere agreement of the contracting parties;<sup>38</sup> and in England, its idea, though not, perhaps, its Roman form, may have assisted the buyer who wished to sue in detinue but lacked property in the goods, for he counted on a bailment to the seller and a subsequent redelivery. So the device may have encouraged acceptance of the notion that sale conveys property.<sup>39</sup>

In the Scots law of *constitutum possessorium* the judges had to balance its convenience for the contracting parties against the protection needed by strangers to the contract. Lord Justice-Clerk Hope asseverated that the buyer who failed to take precautions against the results of the seller's bankruptcy should be the one to bear the loss, not the seller's general creditors who justifiably believed him to own what he possessed.<sup>40</sup> At the same time, modern commerce, with its intricacy and speed, must be liberated from overenthusiastic application of the *traditionibus* rule.<sup>41</sup> Bell observed that even if the buyer received actual delivery of the materials which he at once redelivered to the seller for use in manufacturing the article, third parties would be no better informed of the true ownership of the materials than if those had remained with the seller on a *constitutum possessorium*.<sup>42</sup> Image and impression: the seller ought not to receive unjustified credit from those who looked at his possessions-- other men's property-- which lent him the sheen of substance. Therefore, by the rule of reputed ownership, those who had negligently or collusively enabled the possessor to act the part of full owner, with their goods as his props, would lose their vindicatory rights against the creditors misled by the show.<sup>43</sup> Now, as even Lord Justice-Clerk Hope conceded, this rule had exceptions where, by virtue of the custom of a particular trade, the seller's creditors were not entitled reasonably to assume that he owned what they saw. One such instance was the shipbuilder with a vessel in his dock.<sup>44</sup>

We recall that in *Sutherland* Lord Cowan held: "The personal right to the property in the vessel on the stocks vests in the purchaser." This accords with section 1 of the Mercantile Law Amendment (Scotland) Act 1856, to be discussed. The section diverged from the view of *Simpson* current in the Court of Session that at Scots common law the buyer acquired the real right of property in the vessel after paying the first instalment. If the builder-seller was to provide the materials, then, once he went bankrupt, how could a personal right to the property, rather than a real right of property, avail the buyer in his fight not only with the trustee but also with those other holders of personal rights, the general creditors? Perhaps the better view at common law should be that, on paying the first instalment, the buyer gained a real right in the vessel together with a personal right to the delivery of so much of the vessel as had been built up to that

date. In precedence of rights, though, real surpasses personal: the buyer would naturally have chosen to enforce the greater against the seller and third parties.

The Mercantile Law Amendment (Scotland) Act 1856<sup>45</sup> in effect removed the need to rely on *constitutum possessorium* in the sale of goods. A few years later, the House of Lords reinterpreted *Simpson*.

Section 1 of the 1856 Act provided that sold, undelivered goods left in the seller's custody should remain immune from the diligence of his creditors, so that the buyer might enforce delivery. The section applied to a perfected sale only.<sup>46</sup> Of significance was the fact that it did not lay down that sale should convey property in the goods.<sup>47</sup> Still, in Lord Blackburn's view, it rendered the difference between the Scots buyer's right to enforce delivery and the English buyer's right of property "merely a nominal distinction not affecting the substantial rights."<sup>48</sup> It left the *traditionibus* rule undisturbed, but alleviated the rigour of its application.

To reinterpret *Simpson* was, for the House of Lords, to attack the case. In *McBain v. Wallace & Co.*,<sup>49</sup> Lord Watson dismissed the Scots common law on the matter as being of virtually antiquarian interest, difficult and doubtful: Scots authorities other than *Simpson* were closer to Wallace & Co.'s case. From the oblique he passed to the direct in *Seath v. Moore*,<sup>50</sup> deciding that *Simpson* could not be "held as authority for the general proposition that in the circumstances narrated in the report the property of that part of an unfinished ship which had actually been constructed passes to the purchaser without delay." This contradicted the interpretation put upon the case by some judges of the Court of Session and Bell,<sup>51</sup> so that without further thought it may be hard to agree with the editor of Bell's *Principles*,<sup>52</sup> Guthrie, that Lord Watson did not impeach the rule explained in decisions such as *Boak v. Meggat*,<sup>53</sup> *Orr's Trustee v. Tullis*,<sup>54</sup> *Wylie & Lochhead v. Mitchell*,<sup>55</sup> *Spencer & Co. v. Dobie & Co.*, and *Sutherland*.<sup>56</sup> At first blush, Lord Watson's holding reduces to the proposition that one general creditor of Duncanson could repulse the others and the trustee, with no right capable of generating such an immunity from diligence. It is to *McBain*<sup>57</sup> that one must return for an intimation of the altered view of *Simpson*: Lord Chancellor Selborne read Lord Monboddo to mean that property had not passed but that the trustee who wanted the ship was obliged to reimburse Simpson for his expenditure thereon. This suggests a claim for recompense on the termination of co-ownership. Eleven years before *McBain*, the First Division in *Wylie & Lochhead*<sup>55</sup> had decided that where the buyers of a hearse had by agreement contributed work and materials to it, and the fixtures could not be separated without damage to the whole, the parties owned the hearse in common. High

authority in the Civil and Scots law was consulted;<sup>58</sup> though not expressly referred to, *Institutes* 2.1.27., most relevantly to the facts there in issue, states that if the goods of two owners are with their consent mixed, the resultant corpus is the common property of both parties. The seller having gone bankrupt, the buyers were allowed to take the hearse, provided that they recompensed the trustee of the seller for his share of it. Although *Wylie & Lochhead* was not mentioned by the House of Lords in *McBain and Seath*, the reinterpretation of *Simpson*, the buyer having likewise contributed materials to the construction of the ship, would seem to rest impliedly upon co-ownership. On the evidence of *Simpson* and *Wylie & Lochhead*, each co-owner's title to his own share of the common thing survives as a real right the bankruptcy of any single co-owner, without being converted into a personal claim for recompense. By now it will be apparent that *Simpson* and *Wylie & Lochhead* differed on their facts from *Sutherland*, according as the buyer contributed materials to the manufactured thing or else received what the seller's work and materials had produced without assistance. It follows that, until the 1856 Act, for the buyer's claim to the manufactured article not to be downgraded to a personal right which could be maintained as against other general creditors of the seller only at the cost of doing violence to settled laws of bankruptcy, *constitutum possessorium* was as competent and necessary to the non-contributing buyer as co-ownership was to the buyer who did contribute. The legal distinction is that the former acquired that exclusivity of ownership which the idea of co-ownership denied to the latter.

Shipbuilding contracts today are governed by sections 16, 17, and 18(5) of the Sale of Goods Act 1979. Such contracts will generally be understood to require delivery of a finished ship;<sup>59</sup> but the parties may instead agree that property will pass at some time before the ship is finished.<sup>60</sup> The decisive question-- what was their intention, as expressed in the contract?-- is answered by the judge's examining the contract and the parties' behaviour thereunder.<sup>61</sup> Important though not essential factors will be whether, if so required by the contract, the buyer duly paid the first instalment; and whether, until then, he or his agent regularly inspected the work.<sup>62</sup> If construction has in fact reached the stage at which the contract provided that property should pass, the materials and other fabric subsequently appropriated by the seller to the ship become the buyer's through accession. The seller can only be said to appropriate, to sell those materials if he affixes them to or in a reasonable sense makes them part of the corpus: and in formulating this rule, Lord Watson agreed with Jervis C.J. that the judge asks "What is the ship?" not "What is meant for the ship?"<sup>63</sup> If the seller quits after the stage at which property shall pass but before he has finished the vessel, then, on the authority of



*Sutherland*, as updated to take account of the Sale of Goods Act 1979, the property in what has already been built and appropriated will pass by sale. So far as the other materials have yet to be acquired, manufactured, and appropriated to the corpus, they remain future goods. The transaction is partly a sale and partly an agreement to sell.

#### Lord Cowan's exposition of specific implement

Noticing a single reference in Lord Cowan's exposition, and that to an English textbook, one asks whether the learned judge could have found any Scots authority. Where is the leading principle from Stair,<sup>64</sup> that in Scotland the choice of remedy, whether implement or damages, is the pursuing creditor's?— a passage which had been echoed in the third edition of Bell's *Principles*,<sup>65</sup> published twenty-seven years before *Sutherland*: "On the seller failing to deliver, the buyer may, at his choice, annul the bargain, or insist for performance with damages." Bell had also confirmed the principle at four points in his *Commentaries*. First, discussing risk as a criterion of the transference of goods, he said:<sup>66</sup>

If a person have sold a particular cask of wine, and received the price, he has by the contract of sale conferred on the vendee the *jus ad rem*; and he is by the obligation contained in that contract, bound to deliver the wine when demanded. ... The buyer may by action compel the delivery; and if this have become impossible by the fault of the seller, he will be entitled to damages.

It does not appear from this passage that the wine need be rare or especially valuable, only that it should be separated from all the other wine which may be for sale at the time of the contract. Secondly, an oblique reference makes sense only if the buyer may successfully demand the goods themselves. As regards fungibles-- those things "not specific but [which] consist in quantity and number"<sup>67</sup> -- completion may for certain purposes exist before the goods have been made specific by identification. "The seller may be constrained to fulfil his obligation of separating and delivering the quantity; the buyer may be forced to pay on the quantity being ascertained."<sup>67</sup> When Bell wrote these words, Scots common law gave the buyer a *ius ad rem specificam* once sold fungibles had been individualized.<sup>68</sup> Erskine had stated that "the sovereign or primary real right is that of property; which is the right of using and disposing of a subject as our own, except in so far as we are constrained by law or paction."<sup>69</sup> If everyone may lawfully use his fungibles as he pleases, the owner is normally entitled to keep his fungibles unseparated. In Bell's proposition,<sup>67</sup> the court's sole jurisdiction for ordering the seller to separate his fungibles is a paction, a valid contract. Unless the seller is then to

deliver the goods when they have been identified, the proposition leads to the issue of a vain decree which amuses the seller and embarrasses the court. If the decree is not to be vain, the court must either refuse the claim for separation or else supplement it with another for the delivery of the goods to the buyer. Thirdly, when dealing with the buyer's claims under the contract, Bell states: "The buyer, in like manner as the seller, has a right to insist on implement of the contract, by delivery of the goods; and this either before or after he shall himself have done his part."<sup>70</sup> In general, the seller insists for payment of the price, not delivery of goods. But the passage supports Gow's point that specific implement should be allowed if the contract binds the seller to pay the price and also trade in another commodity, such as a vintage Bentley.<sup>71</sup> And there seems no need to limit this suggestion to second-hand cars. Fourthly, when Bell proceeds to discuss indemnification for loss, he observes that "while delivery is possible, the buyer has his alternative to insist for delivery in specie or for damage."<sup>72</sup> The second rule inferred from this principle is that if "the non-delivery has arisen from bankruptcy, the alternative claim for delivery or damages stops on that event; the claim *then* resolves itself into damage, on the maxim, '*In loco facti imprestabilis subsit damnum et interesse.*'"<sup>73</sup> Impossibility of performance does not therefore include the notion that the goods are not rare or extraordinarily valuable. Although Bell cites no authority for these four passages, they are consistent with one other and with Stair. They show that, however much he might be accused of passing off much English law as Scots law,<sup>74</sup> Scotland's leading writer on commercial law regarded the right of specific implement of a contract as defeasible on the ground of the impossibility created by the defender's bankruptcy, but not on the ground that the goods were ordinary commercial goods of no unique or extraordinary value to the pursuer. M.P. Brown<sup>75</sup> mentioned the civilian controversy over the competence of specific implement of the seller's obligation to deliver, and included a long quotation from Pothier arguing that, on the better view, the buyer was entitled to the remedy. It is remarkable that, later in *Sutherland*,<sup>76</sup> Lord Cowan referred to Stair, Pothier, and Brown to support a ruling on damages for loss of profits, but did not do so when discussing specific implement.

There were also prior decisions. In *Watt v. Mitchell & Co.* (1839),<sup>77</sup> Lord Medwyn had held:<sup>78</sup> "Now, it is quite true that implement, as the proper fulfilment of a contract, is the principle of our law. We enforce it by personal diligence, and adjudication in implement is founded upon it. Other systems of law, I believe, do not so fully adopt this principle." This ruling was *obiter*, for although Watt concluded for delivery of the 200 tons of hemp and further and separately for £2,000, as damages for non-

delivery, as well as for general damages, the Second Division concentrated on the assessment of damages. But this prior *dictum* should have been at least distinguished or overruled, not ignored, in *Sutherland*.

*Howie v. Anderson* (1848)<sup>79</sup> was relied on by Lord Reid in *White & Carter (Councils) Ltd.*<sup>80</sup> On 8 October, 1846, Anderson sold Howie 80 North British Railway shares at £34 each, to be delivered on 8 January, 1847. Anderson reconsidered his contractual obligations and on 28 October wrote a letter setting conditions for his future performance and sent it to his brokers, who forwarded it to Howie. Howie answered by instructing his own brokers to accept Anderson's terms, but before the acceptance reached Anderson on 31 October, Anderson had written to his broker saying that as his offer had not been accepted, it was now withdrawn. This repudiation was an anticipatory breach of contract. Howie claimed £700 damages from Anderson, who pleaded that<sup>81</sup>

the date at which the damage ought to be estimated was the 31st of October, when he had intimated to the purchaser that he had broken off the bargain. The subject-matter of the sale was a marketable commodity, which it was in the power of the purchaser to replace upon the transaction being broken off. It was open to him at that time to have gone into the market and bought in other shares of that stock as against the defender, so that the measure of damage would be the difference between the contract price and the price at which the shares might be so purchased, and this was the course he ought to have followed.

A note cited the English cases of *Gainsford v. Carroll*<sup>82</sup> and *Shaw v. Holland*.<sup>83</sup>

The Second Division granted Howie £420 damages assessed as the difference between the contract price and the market price, not at the date of repudiation (31 October, 1846), but at the date agreed for delivery (8 January, 1847). Though the decree was for damages, the reasons bear on the specific implement of contracts for goods readily available in the market. Anderson's plea sought to burden Howie with an obligation to mitigate damages as from 31 October.<sup>84</sup> Though Lord Justice-Clerk Hope understood Anderson to contend that the contract was no longer current after that date, he emphatically rejected this plea by holding that, in Scots law, Anderson, who had been found entirely lacking in good reasons for his behaviour, "had no power to do any one thing that could alter or affect the rights and interests of the pursuer."<sup>85</sup> And Lord Moncreiff held that such a contention would be<sup>86</sup>

just to lay aside the relative duties and rights of the contract, and throw it on the pursuer, the party injured by a wrongful act, by active measures and engagements for money to relieve the defender, the wrong-doer, of some part of the damage which he had occasioned. As the case stands, on the 31st October the pursuer could not have obtained a similar time-contract for delivery of such an amount of shares, except by an engagement for a much larger sum of money than he had agreed for on the 8th October, and he must have transacted with some other party unknown. What if his resources so stood that he could not be confident of being able to produce the increased sum on the 8th of January, and did not choose to engage for it under all the contingencies of such speculations? And what if his object was not mere speculation, but to get the shares and keep them as a partner of the company? But the essential thing is, that the defender had no right to force him into the consideration of any such matters. There was a plain contract between them; and the defender had no right to put an end to it by any thing but implement at the precise time fixed.

No case has been referred to which has the least tendency, in my opinion, to sanction the doctrine maintained by the defender. The case of Watt ... goes on principles not only adverse to it, but reaching beyond any thing necessary to the pursuer's case.

The Lord Justice-Clerk also followed the judgment of their brother, Lord Medwyn, in *Watt v. Mitchell*,<sup>87</sup> and rejected the English cases, holding, "I am not sure that the opinion in ... *Shaw v. Holland* does not proceed on views entertained in England different from ours. Their law, as to specific implement, is quite different from ours."<sup>88</sup>

The Second Division implicitly affirmed that, had he wished, Howie might have kept the contract alive and claimed specific implement of the share sale on the date agreed for delivery, 8 January; the competence of specific relief excluded the rule on the mitigation of loss. Only the trial judge could then have applied that rule by exercising his discretion to relieve Anderson from the exceptional hardship which the decree of specific implement would cause him.<sup>89</sup> It is noteworthy that though the action for an agreed money sum is not classified as one for specific implement, Lord Reid in *White & Carter (Councils) Ltd.* quoted Lord Watson's ruling in *Grahame v. Magistrates of Kirkcaldy* (a case on interdict) to the effect that the court's discretion of refusal would only be exercised for "some very cogent reason."<sup>89</sup> Moreover, in *Salaried Staff London Loan Co. Ltd. v. Swears and Wells Ltd.* the First Division was faced with an action for an agreed money sum in the form of rent arrears.<sup>90</sup> By following *Stewart v. Kennedy* (on specific implement), *Grahame*, and *White & Carter (Councils) Ltd.*, the court laid the foundation for the inference that the action for an agreed money sum, though perhaps separate from the action for specific implement, will be judged on similar lines, the two being analogous remedies sharing some principles and precedents. The Scots action for an agreed money sum, based on judgments for damages for anticipatory





September next, to the party loding this document with me. For WILLIAM DIXON (Signed) JOHN CAMPBELL."

In August Smith & Son resold Dimmack, Thompson, and Firmstone 1,000 tons of iron at the market price of 45 shillings a ton; were paid; and so handed over the first note.

On 27 October-- almost a month after Smith & Son's insolvency-- Dimmack *et al.* lodged the note with the unwilling Dixon. Action was raised for delivery under the order. By an arrangement with the Western Bank (holders of Smith & Son's dishonoured bill), £1,100 was applied in payment *pro tanto* thereof; Dixon delivered 500 tons; so the present conclusions were confined to the remainder, with an alternative conclusion for £1,500 damages should Dixon fail to deliver. No plea was entered as regards the adequacy of damages.

The Lord Ordinary (Dundrennan) having assoilzied the defenders, the character of the delivery order was discussed by the Whole Court. The majority thereof ruled the document valid, so the First Division pronounced an interlocutor which included the words, "Further, decern and ordain the defender William Dixon, and the defender William Johnston for his interest as trustee ..., to deliver to the pursuers, or their mandatories on their behalf, the quantity of 500 tons of pig-iron of the quality No. 1, free on board at Glasgow, and decern...."<sup>97</sup> Among the majority were Lord Wood,<sup>98</sup> who maintained his prior approach in *Bovill v. Dixon*, and Lord Cowan, who shared a composite judgment with Lords Handyside and Mackenzie. It is significant that the second paragraph thereof ran:<sup>99</sup>

The document is not disputed to have come fairly and onerously into the hands of the pursuers; the words descriptive of the creditor in it certainly apply to them; and the time specified in the obligation for delay in the delivery having elapsed, the question is, Whether there exists any legal ground on which implement can be refused to the defender?

The adequacy of damages was never mentioned as forming such a legal ground. That the iron was a generic commodity, of the type struck at by Lord Cowan's pronouncement in *Sutherland*,<sup>100</sup> appears from the composite judgment in *Dimmack*: "The demand here is not for delivery of any particular thing or subject. It is for implement of a general obligation to deliver 1000 tons of iron."<sup>101</sup>

The result in *Dimmack* conflicted with that of *Dixon*: no separate undertaking was made by Dixon to Dimmack *et al.* as to Bovill-- a distinction drawn by one of the minority of the Whole Court in *Dimmack*, Lord Neaves<sup>102</sup>-- so *Dimmack* yields to the

higher authority of the judgment given later by the House of Lords in *Dixon*. For our purposes, however, it remains important that, in both cases, the pursuer's election, whether supported by separate undertaking or by document, was not rejected on the ground that damages were inadequate. It was regrettable that in deciding *Sutherland* Lords Cowan and Wood failed to remember their participation four years previously in a decision of the Whole Court which contradicted the former's reference to English law.

Lastly, the Mercantile Law Commission had canvassed opinion throughout the realm and recommended that, so far as possible, in the sale of goods the English and Irish rules of specific performance should be assimilated to the Scots law of specific implement.<sup>103</sup> Yet, five years later, Lord Cowan appeared to reverse the recommendation and assimilate Scots law to English equity.<sup>104</sup>

His remarks on the remedy opened tentatively but broadened into the ruling that contracts for commodities would be excluded from its scope. The adverb "generally," though, would leave open possible exceptions such as instalment sales and sales in the context of a market which was malfunctioning. He then contrasted sales of commodities with sales of specific goods. What did he mean by "specific"?

At English law the plaintiff could not confidently expect specific restitution, for *detinue* afforded the sufficiently rich defendant the choice of delivery or payment.<sup>105</sup> This was qualified by equity: as Pollock and Maitland point out, "the Court of Chancery in exercise of its equitable jurisdiction would sometimes compel restitution of a chattel of exceptional value,"<sup>106</sup> but "applications for this equitable remedy were not very common."<sup>107</sup> Often such chattels were unique, so the element of uniqueness entered the equitable jurisdiction over restitution of chattels and over specific performance of contracts relating to chattels. Restitution was based on property rights and so differed from specific performance of contracts;<sup>108</sup> but the remedies were analogous and cases on the former were used in argument in a case about the latter.<sup>109</sup>

### Specific restitution

Equity intervened to act on the defendant's conscience if he had committed a tort or a breach of trust.<sup>110</sup> The earliest case was *Pusey v. Pusey* (1684):<sup>111</sup> the Puseys held land by *cornage*, a tenure in virtue of the family's retaining a horn inscribed *pecote this horn to hold huy thy land* and long delivered to each incoming heir. The defendant somehow<sup>112</sup> got hold of the horn and demurred that the plaintiff's bill neither stated the plaintiff's title as executor or devisee, nor described the horn as an heirloom. Lord Keeper North dismissed these objections, held that other charges in the bill remained



unanswered, and thought that, the tenure being cornage, the heir might be entitled to the horn at law. Seldom has a leading case been so scantily reported.<sup>113</sup> In *Nutbrown v. Thornton* (1804),<sup>114</sup> Lord Chancellor Eldon with little more prolixity described *Pusey* as having "turned upon the *pretium affectionis*; independent of the circumstances as to tenure; which could not be estimated in damages." More enlightening than *Pusey* was *Duke of Somerset v. Cookson* (1735),<sup>115</sup> in which, suing as Lord of the manor and so entitled to treasure trove, the duke claimed a silver altar-piece inscribed in Greek and dedicated to Hercules. This had been purchased, with notice of the duke's claim, by the defendant Newcastle goldsmith, who demurred that the bill should not lie for anything merely personal, any more than for a horse or cow. The defence failed. *Fells v. Read* (1796)<sup>116</sup> concerned a silver snuff-box enclosed in two silver cases and adorned with engravings of public transactions and distinguished persons' heads. This the overseer of St Margaret's, Westminster, refused to surrender until the vestry had approved his disputed accounts. Lord Chancellor Loughborough<sup>117</sup> held that the horn and the altar-piece had been such that

a jury might not give two pence beyond the weight. It was not to be cast to the estimation of people, who might not have these feelings. ... It would be great injustice if an individual cannot have his property without being liable to the estimate of people, who have not his feelings upon it.

Such patrician snobbery ignores the possibility that in a detinue action the judge could direct the jury to put such a high value on the goods that the defendant's election to keep them was excluded;<sup>118</sup> and if a jury numbering twelve renowned experts in art was not permitted this method of acknowledging the plaintiff's sentimental attachment to the goods, then the result would lay bare the deficiency of the law, not the poverty of the jurymen's artistic feelings. Lord Loughborough went on to decide that the overseer had broken an express trust which, on the expiry of his term of office, bound him to restore the subjects to the senior churchwarden. *Lloyd v. Loaring* (1802)<sup>119</sup> arose from a fracas in the Caledonian Lodge of Freemasons. Some members removed the dresses, decorations, books, papers, and other goods to a different meeting-place. The chief mason and secretaries' bill alleged that without the constitution, laws, rules, accounts, members' list, and minutes, as well as the original and irreplaceable charter, which Loaring threatened to destroy, the lodge could not hold lawful meetings. Troubled as he was over the plaintiffs' *locus standi*, Lord Chancellor Eldon still enjoined the disposal of the articles. He did not doubt the court's jurisdiction to order delivery up; and confirmed

this with equal confidence in *Lady Arundell v. Phipps* (1804).<sup>120</sup> The jurisdiction was also corroborated in *Lowther v. Lord Lowther* (1806),<sup>121</sup> which concerned the genuineness of a purported sale of Titian's "Mars and Venus" to an executor's agent; and *Earl of Macclesfield v. Davis* (1814),<sup>122</sup> involving a bequest of heirlooms.

### Specific performance

Similar rules govern contracts for the sale of goods. In *Buxton v. Lister* (1746) Lord Chancellor Hardwicke said:<sup>123</sup>

This court will not entertain a bill for specific performance of a contract of stock, corn, hops, &c. (so *Cudd v. Rutter*<sup>124</sup> ... *Cappur v. Harris*<sup>125</sup> ...), for as those are contracts which relate to merchandise, that vary according to different times and circumstances, if a court of equity should admit such bills, it might drive on parties to the execution of a contract, to the ruin of one side, when upon an action, that party might not have paid, perhaps, a shilling damage.

In *Adderley v. Dixon* (1824)<sup>126</sup> Leach V.-C. explained that the rule rested not on the personal nature of the goods, but on the adequacy of damages at law; and in *Pooley v. Budd* (1851),<sup>127</sup> Romilly M.R. said that, as regards contracts for the sale of goods, the court of equity had long intervened only if there was something special in the nature of the contract. Such were the events of *Falcke v. Gray* (1859):<sup>128</sup> Falcke was an experienced dealer in curiosities and china, and thus familiar with current prices. He offered to buy Gray's two china jars, temporizing that he did not know their value but thought them worth £20 each. Gray later doubted whether his price was fair, took a second opinion from Watson, who offered her £200, and sold and delivered them to him. Kindersley V.-C. confirmed that the rule on the adequacy of damages excluded specific performance of contracts for a certain quantity of coals or stock,<sup>129</sup> but held that as the case concerned jars of unusual beauty, rarity, and distinction, damages were inadequate and specific performance would be granted-- provided that no other objection arose. Equity would not, however, allow specific performance of Falcke's hard bargain. The basic principles of specific performance of the sale of goods were summarized by Addison<sup>130</sup> in the paragraph from which Lord Cowan quoted the last sentence. Shorn of the examples provided by the cases summarized above, the previous sentences read as follows:

Courts of equity will not generally decree performance of a contract for the sale of goods and chattels, not because of their personal nature, but because damages at law, calculated on the market price of the goods, are as complete a remedy for the purchaser as the delivery of the goods contracted for, inasmuch as with the damages he may ordinarily purchase the same quantity of the like goods.... But a contract for the sale of a specific chattel, such as a barge or vessel, (*p*), or a chattel having a "pretium affectionis," or a peculiar value resting on its individuality ... will be enforced *in specie*.

On this passage Lord Cowan could rest his assertion about specific performance of a contract relating to a ship. Footnote (*p*) cited *Claringbould v. Curtis* (1852),<sup>131</sup> whose facts were obscure and whose judgment filled two sentences. On 25 October 1851 Curtis contracted with Claringbould for the sale of the barge, *Providence*. The auctioneer would be paid a percentage of the price, and the buyer was to sign a contract for payment of the balance to Westlake. On 1 November he would be entitled to possession. The plaintiff duly performed and on 27 October received possession of the barge and papers from the defendant's alleged agent. The bill was filed to compel the defendant to execute a bill of sale of the barge. The defence was that on 22 November 1850 the defendant had executed a bill of sale of the barge and stores to Smerden, this having been registered a month later, and that since then the defendant had exercised no act of ownership on his own behalf over the barge. Smerden was said to have allowed the defendant to look after the barge, and to have appointed Rains navigator. In October 1851 the barge ran aground off Sheerness batteries. The auctioneer, Edgecumbe, had authorized the sale; and he (we assume Curtis) believed it was not a *bona fide* sale. No evidence showed on whose authority or behalf the sale had been ordered or the contract signed. Romilly M.R. conceded that his decree could not bind Smerden, who was not before the court; yet held that the plaintiff would have been entitled to decree for specific performance and costs, the Master to settle the latter in case the parties should differ. A closing footnote cited *Pusey*,<sup>111</sup> *Errington v. Aynsley*,<sup>132</sup> *Flint v. Brandon*,<sup>133</sup> *Nutbrown*,<sup>114</sup> *Buxton*,<sup>123</sup> *Cud*,<sup>124</sup> and an earlier opinion by Romilly M.R., *Pooley*.<sup>127</sup>

Another case which Lord Cowan could have consulted as authority that contracts relating to ships might be specifically enforced, this time by the seller, was *Lynn v. Chaters* (1837).<sup>134</sup> But as the sellers risked being non-suited at law and in equity by the purchasers' raising an unfair defence to the suit for specific performance, it is thought that Lord Langdale M.R. would have granted specific performance even if the subject was not such as usually came within the jurisdiction.

Now, consider Lord Cowan's generalization about "the sale of a specific article or thing, as a particular horse, or some article of furniture, or of a house."<sup>135</sup> Horse?





holding that there "may be a doubt as to what the purchase-money is to be, but that he is entitled to the ship there appears to be no doubt at all."<sup>148</sup> Like *Lynn*,<sup>134</sup> *Batthyany v. Bouch* (1881)<sup>149</sup> was a suit brought by the seller after the buyer had rejected the yacht *Kriemhilda* and refused to pay. The bill was for specific performance or, in the alternative, for the price of £2,600; for damages for breach; and for other relief as necessary. Most of Grove J.'s judgment went to disposing of the defence that section 55 of the Merchant Shipping Act 1854,<sup>150</sup> and section 3 of its amending Act of 1862,<sup>151</sup> struck down the agreement to transfer the yacht. The Acts were held to govern the transfer, not the contract, and the plaintiff's demurrer was upheld. "I shall not decide here what portion of relief the plaintiff is entitled to," said Grove J.,<sup>152</sup> "I have not to decide that." As specific performance was not actually granted, *Batthyany* is at most authority that the merchant shipping statutes do not bar the remedy and is only indirect support for the propositions in *Halsbury*,<sup>153</sup> *Sharpe*,<sup>154</sup> and *White and Tudor*.<sup>155</sup> In contrast to the illustration in the *Restatement, Contracts, Second*<sup>156</sup> of the racing sloop, *Columbia*, "regarded as a witch in light airs and, therefore, superior," there is no sign that the *Kriemhilda* was special or that a four-figure sum of damages would have been inadequate. And in choosing the case to support his statement that a contract for the sale of a ship is "one for which specific performance may be obtained," McMillan in *Green's Encyclopaedia* (1933)<sup>157</sup> passed over the pivotal case on the modern jurisdiction on the sale of ships in England.

In *Behnke v. Bede Shipping Co. Ltd.* (1927),<sup>158</sup> Wright J. (as he then was) held that a ship, though not affected by some of the rules applying to most chattels (for example, sale in market overt), yet governed by special statutes on registration and transfer, was still a specific chattel satisfying the definition in section 61(1) of the Sale of Goods Act 1893. Applying section 52 of the 1893 Act, he noted the dearth of authority for the enforcement of this type of contract: *Claringbould* "is the case of a barge and contains no discussion of principle,"<sup>159</sup> Fry having referred to it when suggesting that the remedy might be claimed in respect of ships;<sup>160</sup> and *Hart* "seems to imply that a man who has contracted to purchase a ship is *prima facie* entitled to have it-- that is, by an order for specific performance."<sup>161</sup> Wright J. listed the special features of the *City*:<sup>161</sup> old and cheap, she yet had practically new engines and boilers that would satisfy the registration formalities in Germany, where the plaintiff urgently needed to use her. Only one ship compared with her, said an experienced ship valuer, and that might already have been sold. Damages were held inadequate. The importance of *Behnke* lies in Wright J.'s having firmly placed within the scheme of the modern law on the sale of



It is ... perfectly true that you cannot walk into a store or warehouse or a shop and buy this type of machinery from stock. Nevertheless, it is, ... on the evidence, a type of machinery which is obtainable in the market in the ordinary course upon placing an order and, although delivery in response to such an order must involve delay, this is a case in which ... the ordinary principles enunciated by Lord Justice Atkin ... apply: damages are a sufficient remedy.

In *Re Wait*<sup>168</sup> Atkin L.J. had said that "speaking generally, courts of equity did not decree specific performance of contracts for the sale of commodities which could be ordinarily obtained in the market where damages were a sufficient remedy."<sup>169</sup> Behnke needed the *City* at once, the Tunisians did not want to wait months for substitute machinery; but *Bronx Engineering* established that, if the seller can pay whatever damages are finally awarded, the delay and loss ensuing while a substitute is bought do not in themselves bring the case within the equitable jurisdiction. What Behnke could show and the Tunisians could not was that the only comparable substitute had gone off the market. An exceptional contract for the sale of machinery is not equivalent to the sale of a ship of practically unique value. We may still doubt whether the court commanded sufficient knowledge for an accurate pronouncement on the state of Bronx Engineering's finances. Having stressed that both parties had testified on affidavit, and that the urgency of the matter precluded thorough deliberation,<sup>170</sup> Lord Edmund Davies therefore allowed himself an important assumption when holding that, simply because there had been no suggestion of their inability to satisfy a money judgment, Bronx Engineering would be able to pay inflated damages.<sup>171</sup> What if, unknown to the court, they were teetering on the brink of liquidation and shortly afterwards toppled over? A right to prove in their liquidation would have been small comfort to the Tunisians, who might have spent hundreds of thousands of pounds if the market price for a substitute had been rising. For prudence' sake, a plaintiff would now be wise to gather maximum intelligence of his opponent's liquidity and, if need be, state in the application for interim relief that the latter's ability to pay inflated damages is doubtful. This averment would go some way to impugn the validity of the kind of assumption made in *Bronx Engineering*. And as Jones and Goodhart observe,<sup>172</sup> it was particularly onerous for the plaintiff to prove the loss on a machine to be used in Tunis.

Passing from *Bronx Engineering* to *C.N. Marine Inc. v. Stena Line A/B and Regie voor Maritiem Transport (The "Stena Nautica")* (No.2.),<sup>173</sup> one finds a similar approach in a case about a ship. In the Queen's Bench, Parker J. said:<sup>174</sup>



On the basis of [*Bronx Engineering*] and ... on the wording of s. 52 [of the 1979 Act] itself, I reject the proposition that the purchaser of a ship is prima facie entitled to specific performance. Such an order can, under s. 52, be made only on the application of the plaintiff. It is of the essence of such an order that damages will be an inadequate remedy. It must, therefore, be an essential ingredient of the application for the plaintiff to establish that this is the situation.

And May L.J. in the Court of Appeal held:<sup>3</sup>

[Parker J.] expressed the view, with which I entirely agree, that as a matter of law an order for specific performance can be made in respect of a ship. Per contra, it in no way follows that there should be [such] an order ... in respect of every contract for the sale of a ship.

May L.J. preferred Sachs L.J.'s rephrasing of the adequacy of damages test in *Evans Marshall & Co. Ltd. v. Bertola S.A.*<sup>176</sup> "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?" The Court of Appeal in *C.N. Marine Inc.* saw no reason to disturb Parker J.'s ruling, and specific performance was refused. A 1983 case quoted by Jones and Goodhart<sup>177</sup> as modifying the strictness of *Bronx Engineering* as to the factor of delay where the goods are in scarce supply is *Eximenco Handels A.G. v. Partrederiet Oro Chief and Levantes Maritime Corporation (The "Oro Chief")*<sup>178</sup> where Staughton J. held<sup>179</sup> that

The first question ... is whether the chattel to be sold can or cannot readily<sup>180</sup> be replaced by the purchase of a similar chattel in the market. If it cannot, there is at least a prima facie case for specific performance. If it can, the purchaser will ordinarily be left to his remedy in damages, but it may be that in special circumstances, such as when the seller is insolvent and can pay no damages, he will still obtain an order for specific performance. At this stage there is no enquiry as to the value of the chattel for a person with the characteristics of the buyer. It is an enquiry whether the character of the chattel itself is such that it is unique, or cannot for the time being be replaced by the purchase of a substitute in the market.

That test is plainly satisfied in the present case. *Oro Chief* is an ore/oil carrier. She has certain advantages of flexibility in trading. Only a limited number of such vessels of similar size exist. At present none is available for sale in the market.

Staughton J.'s remarks were *obiter*, for he had previously found that the seller had lawfully cancelled the contract with the plaintiff buyer, so was not bound to deliver; but if that duty had subsisted, the remedy would have been decreed.

Since Lord Cowan's reference to Addison,<sup>11</sup> the English jurisdiction over ships

has narrowed, so that, where formerly such contracts would by their nature fall within the principle, they now have to be proved to come within the principle because damages are inadequate. If quoted to a English court, Lord Cowan's observations on ships would be out of date: there was no sign that in *Sutherland* damages would have been inadequate for non-delivery-- indeed, the *ratio* concerning damages for late delivery<sup>181</sup> rested on the assumption that the defender could pay the award, and it would just have needed more arithmetic to determine the amount of loss flowing from non-delivery. As the *Maria* does not seem to have been special in the way that the *City* and the *Oro Chief* were special, if the company had not delivered, *Sutherland* could have gone to another shipbuilder on the Clyde, say, and asked him to construct a schooner of the description given in Montrose Shipping Company's offer to build. If *Sutherland* is no longer good authority in England, why should its restrictions still limit the jurisdiction in Scotland?

#### **Purves v. Brock**

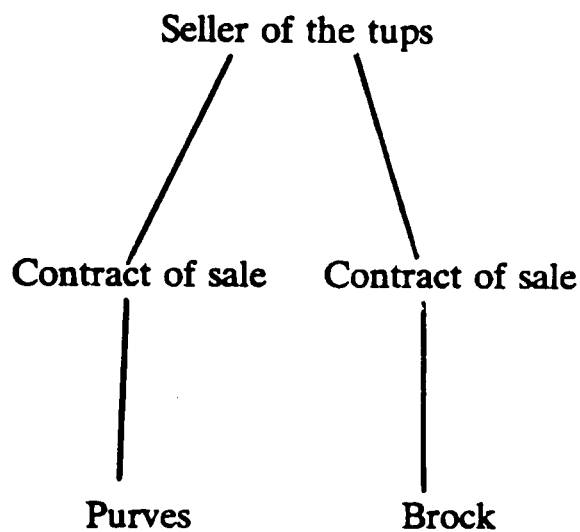
The next two cases relied upon by Gloag<sup>182</sup> and Walker<sup>183</sup> are *Purves v. Brock* (1867)<sup>184</sup> and *Henry v. Morrison* (1881).<sup>185</sup> Neither can be decisive authority on specific implement, for neither concerned specific implement. Both are examples of what South Africans would call an owner's *rei vindicatio* for the return of what he owns.<sup>186</sup> It is interesting that in Scotland this kind of action seems to be classifiable as being for decree *ad factum praestandum*: a detail affecting the debate on *White & Carter (Councils) Ltd*<sup>187</sup> and specific implement. *Purves* and *Henry* have further implications for the widening of the buyer's remedies under the Sale of Goods Acts 1893 and 1979.

In *Purves* there had been a sale of Sinclair's farm-stocking in Stainland, Caithness, on 9 May, 1865. The First Division<sup>188</sup> found as a matter of fact that two tups had been successively exposed, and Purves had bought one for £3. 5s. and Brock the other for £3. 3s. The next day, the exposers' servants delivered one to each party, but mistakenly delivered to Brock's servants the tup which Purves had bought. Brock then clipped it and now retained it and its fleece, despite Purves's demands for their return. Sheriff-substitute Russel<sup>189</sup> preferred Purves's evidence as supporting the claim, and rejected Brock's plea that, as no contract bound the litigants to each other, Purves must sue the exposers. Sheriff Fordyce then assoilzied Brock:<sup>190</sup> as Purves had never received the tup which had always been in Brock's possession, no right of property rested in Purves. No constructive delivery had taken place between the clerk of the roup and Purves. As no contract bound Purves to Brock, the action was incompetent and should have been laid against the seller. But the First Division restored the Sheriff-substitute's

ruling with an interlocutor that ran as follows:<sup>191</sup>

Find as matter of law that the petitioner [Purves] is entitled to vindicate and obtain delivery of the tup bought by the Petitioner and retained by the Respondent. Therefore repel the defences ordain the Respondent to deliver to the Petitioner the tup and fleece as prayed and decern.

The verb "to vindicate" shows that the action was a *rei vindicatio*. It could not have been an action for specific implement of a contract: Brock had pleaded and Sheriff Fordyce held, correctly, that no contract bound the litigants to each other. A diagram helps to show this fact.



Where Brock and Sheriff Fordyce erred was in then assuming: "No contract, no remedy." Specific implement being a contractual remedy, Purves had to find some other ground on which to sue Brock. That ground was Brock's wrongful retention of Purves's tup bought at the sale of farm-stocking and subsequently misdelivered by the seller: Brock's course of action, therefore, was a proprietary remedy. Another point of significance is that Purves had never received the tup, yet succeeded in a *rei vindicatio*. So an owner need never have actually possessed the thing sold, and still be entitled to raise the real action of *rei vindicatio* against a stranger to the contract. The Macpherson report<sup>192</sup> mainly deals with the plea that as the tup was bought for £3. 3s., the value of the case was below the limit of £25, and Brock's advocacy to the Court of Session was incompetent. Rejecting this plea, Lord President Inglis held:<sup>193</sup>

The price that is paid for an article sought to be recovered cannot conclusively fix the value of it, ... It may be of much greater value to the possessor, because its value to him may be enhanced by circumstances which do not affect others, and therefore the mention of the price paid for the tup does not prove that the cause is under the value of L.25. It is incumbent on a party objecting that a cause is under that value, to prove that it is so from the pleadings alone.

These words and the result of the case would be consistent with the following propositions: the pursuer may raise a *rei vindicatio* to claim what may have a special value, a *pretium affectionis*, for him; he is entitled to the thing itself, not just its worth in damages; the choice of restitution or damages is therefore the pursuer's and not, as in detinue at English common law, the defendant's; the thing may be an ordinary article of commerce, neither unique nor exceptionally valuable. These features distinguish the *rei vindicatio* from the detinue action at law and the specific restitution suit in equity. But if Gloag<sup>182</sup> and Walker<sup>183</sup> intended them as authority by analogy for the rule that the pursuer's claim to specific implement is limited to goods that are individualized, Bell's wider formulation<sup>67</sup> now being overruled, it is thought that the rules on a proprietary remedy cannot limit those on a contractual remedy. Apart from the possible inferences above, it is not clear why the learned authors think *Purves* applicable to specific implement.

### Henry v. Morrison

The process papers<sup>185</sup> show that Henry was a S.S.C. in Edinburgh, and to his firm as cashier and bookkeeper in 1873 there came Morrison, at a starting salary of £80 raised to £150 for good work. In 1877 his performance slackened, he was often absent, and though he said that his ill-health resulted from speculations on the stock market a doctor who examined him at Henry's request could find nothing wrong. Despite warnings and reduction of salary, Morrison did not mend his ways, so was dismissed. Henry ordered the chief clerk, Scott, to take over Morrison's work. Morrison told Scott that, unless paid his salary of £150, he was ruined: he had bills current and a warrant for imprisonment against him, and he planned flitting to the Holyrood Sanctuary. He refused to return the office keys and threatened that, unless paid more, he might be forced to take something. Though paid an *ex gratia* sum, he took some documents, including the IOUs in question. These bore to be granted by Scott, carried his initials, and totalled £16 18s. 6d. Their background was this:<sup>194</sup>

Scott did not draw his salary regularly as it fell due, but sums as he required them, leaving the balance to accumulate at his credit, ... When paying Mr Scott the sums received by him the defender frequently requested him to obviate the entering of small sums, to give him memoranda of them, and he would afterwards slump and enter them. Mr Scott ... from time to time granted IOU's for the sums so received, and which defender retained in his cash-drawer, carrying the amounts from time to time to Mr Scott's debit in the cash-ledger.

Condescence 6 makes plain the nature of the action:<sup>195</sup>

The ... IOU's were granted to the defender, as cashier of the pursuer, and he obtained possession of them in that capacity. They were intended to be, and are vouchers for sums paid out of the pursuer's funds, with which Mr Scott was subsequently debited in the books of the pursuer, and they are the property of the pursuer, and the defender has no right or title to them. The defender wrongfully took [them] away with him when he left the pursuer's employment, and has since then wrongfully retained possession thereof, and has refused to deliver [them] to the pursuer, although requested to do so.

The Lord Ordinary (Adam) doubted the competence of the action. He cited *Purves*<sup>192</sup> and *Shotts Iron Co. v. Kerr*,<sup>196</sup> a summary petition to the Sheriff Court for delivery of four year-old lambs, failing which payment of £10 or whatever sum was found to be their value. A comparative link with the approach of South African law is made by Lord Neaves:<sup>197</sup>

It is said that this is an action *ad factum praestandum*. I think it falls under another category. It is a *rei vindicatio* brought by a party for recovery of his own property. Now a man is entitled to get back his own property, and is not bound to take it as commuted into money. If the pursuer can recover *in forma specifica*, he is entitled to do so; for another is not entitled to keep what belongs to him.

Lords Cowan and Benholme classed it as an action for decree *ad factum praestandum*, and Lord Justice-Clerk Moncrieff concurred.<sup>198</sup> A *rei vindicatio* can be a species of decree *ad factum praestandum*.

When *Henry* reached the First Division,<sup>199</sup> Lord President Inglis did not share Lord Adam's doubts and firmly held that in this action for decree *ad factum praestandum*, not payment, its value might exceed that of the IOUs and its purpose might be not the recovery of the money but perhaps the vindication of the pursuer's character in another action, or proof that the documents were forged. Without needing to state his reasons for the claim, the pursuer need just say that they were his and he would be

entitled to them, regardless of their value. By holding that the authorities did not support the defender's plea of incompetence, Lord President Inglis conformed to the majority opinion of the Whole Court in *Aberdeen v. Wilson*<sup>200</sup> that a summary petition for delivery of fleeces or, failing delivery, payment of £20, or such other sum as should be ascertained to be their value was not a form of claim hit by the £25 limit under section 22 of the Sheriff Courts Act 1853. Though he had been among the dissenters in *Aberdeen*,<sup>201</sup> in *Henry* he was certain that since *Aberdeen* the law was clear. Lord Deas concurred<sup>202</sup> and, supporting the rule that an object might have a value to the pursuer far beyond its market value, he instanced the "crooked bawbee" which might have considerable latent value in being a pledge of a private marriage left in one spouse's keeping. Once again, *Henry* shows that the vindicating owner is not forced to accept the money valuation of his object if he desires the object itself. But *Henry* cannot limit the scope of specific implement, for Henry and Morrison's contract ended three years before the action. The comments on *Purves* apply correspondingly.

#### Notes

1. GLOAG, CONTRACT 656 and n. 2, 657 and n. 3.
2. WALKER, CIVIL REMEDIES 278, 280, 660; CONTRACTS 541, 542; PRINCIPLES OF SCOTTISH PRIVATE LAW Volume II 160 (4th ed., 1988); Volume IV 282 (3d ed., 1983).
3. 1860, 22 D. 665 (2d Div.).
4. 1867, 5 M. 1003 (1st Div.).
5. 1881, 8 R. 692 (1st Div.).
6. 30 S.L.R. 2 (1889) (2d Div.).
7. 1913 S.C. 954 (1st Div.).
8. 1916 S.C. 882 (2d Div.).
9. 1949 S.C. 49 (1st Div.).
10. 1967 S.C. (H.L.) 53.
11. *Sutherland*, 22 D., 671.
12. M.P. BROWN, A TREATISE ON THE LAW OF SALE 226 (1821).
13. R.J. POTHIER, *Traité du Contrat de Vente* No. 74, in 3 OEUVRES DE POTHIER 36 (M. Bugnet (ed.), 1861).
14. STAIR, INSTITUTIONS *semble* 1.17.16.; *cf.*, 1.9.4.2.
15. Walker, 63 J.R. 1, 13-4 (1951).
16. *Id.*, 15.
17. *Cf.*, *Summerlee & Mossend Iron Co. v. Caledonian Railway* 1911 S.C. 458 (2d Div.); *McKellar v. Dallas' Ltd* 1928 S.C. 503 (2d Div.).

18. COD. JUST. 2.3.20-- "perhaps the most famous maxim in Roman Law": P. BONFANTE, CORSO DI DIRITTO ROMANO: PROPRIETÀ, Vol. II, Part 2, 152 (1928), translated by GORDON, STUDIES IN THE TRANSFER OF PROPERTY BY TRADITIO 1 (1970), on which my account of *constitutum possessorium* is based, and which is abbreviated to GORDON, TRAD.; STAIR, INST. 3.2.5.; ERSKINE, INST. 2.1.19.; 1 G.J. BELL, COMM. 181; McBain v. Wallace & Co., 1881, 8 R. (H.L.) 106, 111 *per* Ld. Blackburn; Seath v. Moore, 1886 13 R. (H.L.) 57, 67 *per* Ld. Watson.
19. 3 G. BRODIE, STAIR'S INSTITUTIONS 898 *et seq.* (4th ed., 1831); the volume is erroneously designated "Vol II" on the title page.
20. 2 August, 1786: 2 D. DALYRYMPLE, LORD HAILES, DECISIONS OF THE LORDS OF COUNCIL AND SESSION 1000 (W. Tait (ed.), 1826); A. LAW *et al.* (eds.), DECISIONS OF THE COURT OF SESSION 1781-1787, 446 (1792); 16 W.M. MORISON, DICTIONARY 14, 204 (1811); 1 BELL, COMM. 177-8.
21. *Cf.*, Barclay, Curle, & Co. v. Laing 1908 S.C. 82, 87 *per* L.P. Dunedin.
22. "[A]n immunity is one's freedom from the legal power or 'control' of another as regards some legal relation": HOHFELD, FUND. LEG. CON. 60.
23. Wylie & Lochhead v. Mitchell, 1870, 8 M. 552, 560.
24. 1 BELL, COMM. 187.
25. McBain, 1881, 8 R. 360, 368 (2d Div.).
26. Orr's Trustee v. Tullis, 1870, 8 M. 936, 950-1 (2d Div.).
27. McBain, 8 R., 370.
28. Spencer & Co. v. Dobie & Co., 1879, 7 R. 396, 409 (2d Div.).
29. 1 BELL, COMM. 188.
30. GORDON, TRAD. 11.; W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 227 (3d ed. repr., 1975).
31. GORDON, TRAD. 145.
32. *Id.*, relying on the positive evidence of JUST. DIG. 6.1.77.; 41.2.30.5.; VAT. FRAG. 313 (Diocletian and Maximian A.D. 296); and the negative evidence of JUST. DIG. 41.2.48.
33. GORDON, TRAD. 72-6, 96.
34. *Id.*, 112-5.
35. *Id.*, 106, 109.
36. GORDON, TRAD. 141-2.
37. *Id.*, 146-7.
38. CODE CIVIL art. 1138; *see*, also, art. 1583; GORDON, TRAD. 27, 182 n.1. The other influence was the theory of Donellus, the Natural Lawyers, and some Romanists of the Elegant Jurisprudence that *traditio* was superfluous for the transfer of ownership, and that the emphasis should fall upon the parties' intention and the acquirer's controlling the thing: GORDON, TRAD. 168-83.
39. *Supra* chapter 6; Milsom, 77 L.Q.R. 257, 274-5; GORDON, TRAD. 11 n. 2.
40. Boak v. Meggatt, 1844, 6 D. 662, 668 (2d Div.).
41. 1 BELL, COMM. 178.
42. 1 BELL, COMM. 189.

43. *Id.*, 269-70.
44. *Boak*, 6 D., 669.
45. (19 & 20 Vict. 60).
46. *McMeekin v. Ross*, 1876, 4 R. 154, 159 (1st Div.) *per* L.P. Inglis; *Seath*, 13 R. (H.L.), 65 *per* Ld. Watson.
47. *Seath*, *supra* note 46, 60 *per* Ld. Blackburn, 64 *per* Ld. Watson.
48. *Id.*, 60 *per* Ld. Blackburn.
49. *McBain*, 8 R. (H.L.), 116 *per* Ld. Watson.
50. *Seath*, 13 R. (H.L.), 64.
51. *Supra* 199.
52. G.J. BELL, PRINCIPLES OF THE LAW OF SCOTLAND 509 and n. (1) (10th ed. revd. and enlarged, 1899).
53. 1844, 6 D. 662.
54. 1870, 8 M. 936.
55. 1879, 7 R. 396.
56. 1860, 22 D. 665: the Mercantile Law Amendment (Scotland) Act 1856, rather than the rule in *Simpson*, was applied.
57. *McBain*, 1881, 8 R. (H.L.) at 106.
58. Civil law: JUST. INST. 2.1.25, 26, 28, 34; A. VINNIUS, IN QUATUOR LIBROS INSTITUTIONUM IMPERIALIUM COMMENTARIUS ACADEMICUS ET FORENSIS 2.1.25.; J. VOET, COMMENTARIUS AD PANDECTAS 41.1.23.; H. GROTIUS, DE JURE BELLI AC PACIS 2.8.18, 19; R.J. POTHIER, TRAITÉ DU DROIT DU DOMAINE DE PROPRIÉTÉ 187, 191, 192; S. VON PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 4.7.10. Scots law: STAIR, INST. 3.1.36.; ERSKINE, INST. 2.1.17.; 1 BELL, COMM. 178, PRINC. para. 1298 (503-4).
59. *Reid v. Macbeth*, 1904, 6 F. (H.L.) 25.
60. *Seath*, 13 R. (H.L.), 59 *per* Ld. Blackburn; *Laing v. Barclay, Curle & Co.* 1908 S.C. (H.L.) 1; *Re Blyth's Shipbuilding Contract* [1926] Ch. 494 (C.A.); *Nelson v. W. Chalmers & Co. Ltd.* 1913 S.C. 441 (1st Div.).
61. *Seath*, 13 R. (H.L.), 59.
62. In *Seath* Ld. Watson made the payment factor non-essential but by implication left the inspection factor as essential (*id.* 65-6); however, in *Laing* L.C. Loreburn made the inspection factor non-essential, and both factors subordinate to the question of what the contract really means (*id.* 1-2).
63. *Seath*, 13 R. (H.L.), 66 *per* Ld. Watson, citing Jervis C.J. in *Wood v. Bell*, 6 El. & Bl. 355, 362 (1856); 119 E.R. 897, 900.
64. STAIR, INST. 1.17.16. (Walker's ed., 270).
65. G.J. BELL, PRINCIPLES OF THE LAW OF SCOTLAND para. 118 (3d ed., 1833, p. 37).
66. 1 BELL, COMM. 169 (5th ed., 1826), 180 (7th ed., 1870).
67. *Id.*, 437 (5th ed.), 462 (7th ed.).
68. 1 BELL, COMM. 169 (5th ed.), 180 (7th ed.); BELL, PRINC. 41, 42, 43, 44 (10th ed., 1899); *Hansen v. Craig and Rose*, 1859, 21 D. 432 (2d Div.), 439 *per* L.J.-C. Inglis; GOW, MERC. LAW 73 n. 2.



69. ERSKINE, INST. 2.1.1.
70. 1 BELL, COMM. 447 (5th ed.), 477 (7th ed.).
71. GOW, MERC. LAW 214.
72. 1 BELL, COMM., 449-50 (5th ed.), 479 (7th ed.).
73. 1 BELL, COMM. 450 (5th ed.), 479 (7th ed.).
74. F.H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 50 n. 2 (1953).
75. M.P. BROWN, SALE 211-3, citing POTHIER, *Traité du Contrat de Vente* No. 68 (3 OEUVRES (Bugnet) 30-1), and VINNIUS, INST. (p.608).
76. *Sutherland*, 1860, 22 D. at 672.
77. *Watt v. Mitchell & Co.*, 1839, 1 D. 1157 (2d Div.).
78. *Id.*, 1163; Lord Medwyn, not Lord Meadowbank as GOW, MERC. LAW 218 n. 21 has him.
79. *Howie*, 1848, 10 D. 354 (2d Div.).
80. *White & Carter (Councils) Ltd.*, 1962 S.C. (H.L.) 1, 11-2.
81. *Howie*, 10 D., 356.
82. *Gainsford*, 2 B. & C. 624 (1824); 107 E.R. 516.
83. *Shaw*, 4 Car. & Ol. Rlwy. Cas. 150; or 15 M. & W. 136 (1846); 153 E.R. 794.
84. *Howie*, 10 D., 357 *per* L.J.-C., 359 *per* Ld. Medwyn, 359-60 *per* Ld. Moncreiff.
85. *Id.*, 357.
86. *Id.*, 360.
87. *Watt*, 1839, 1 D. 1157 (2d Div.).
88. *Howie*, 10 D., 358.
89. *Cf.*, *Grahame v. Magistrates of Kirkcaldy*, 1882, 9 R. (H.L.) 91; *White & Carter (Councils) Ltd.*, 1962 S.C. (H.L.), 14.
90. *Salaried Staff*, 1985 S.L.T. 326 (1st Div.).
91. *Howie*, 10 D. 354.
92. *Bovill v. Dixon*, 1854, 16 D. 619 (2d Div.), on appeal *sub nomine* *Dixon v. Bovill*, 1856, 19 D. (H.L.) 9.
93. *Dimmack*, 1856, 18 D. 428 (1st Div. and the Whole Court).
94. *Bovill*, 16 D., 621.
95. *Dixon*, 19 D. (H.L.), 10-1.
96. *Sutherland*, 1860, 22 D. 665 (2d Div.).
97. *Dimmack*, 18 D., 467.
98. *Id.*, 446.
99. *Id.*, 442.
100. *Sutherland*, 22 D., 671.
101. *Dimmack*, 18 D., 446.
102. *Id.*, 453.
103. MERCANTILE LAW COMMISSION *supra* chapter 9.
104. *Sutherland*, 1860, 22 D. at 671.

105. *Supra* chapter 9.
106. 2 P. & M. 154 n. 1.
107. *Id.*, 178 n. 1. *See*, also, F.W. MAITLAND, EQUITY 239 (1909); PLUCKNETT, CONCISE HISTORY 689 and n. 1; W. ASHBURNER, PRINCIPLES OF EQUITY 5 and n. 6.
108. E.H.T. SNELL, THE PRINCIPLES OF EQUITY 570-1 (28th ed., 1982); G.C. CHESHIRE, C.H.S. FIFOOT, M.P. FURMSTON, LAW OF CONTRACT 617 (11th ed., 1986); G.W. KEETON & L.A. SHERIDAN, EQUITY 484 (1969); F. KESSLER & G. GILMORE, CONTRACTS: CASES AND MATERIALS 1000 Note 2 (2d ed., 1970).
109. Counsel's argument: *Fells v. Read*, 3 Ves. Jun. 70, 71; 30 E.R. 899. *See*, too, the citations at the end of *Claringbould v. Curtis* (1852) 21 L.J. Ch. 541.
110. FRY, SPECIFIC PERFORMANCE 37 (6th ed., 1921 hence FRY, S.P.); CHESHIRE, FIFOOT, FURMSTON, LAW OF CONTRACT 617; H.G. HANBURY & R.H. MAUDSLEY, MODERN EQUITY 51 (11th ed., 1981); G. JONES & W. GOODHART, SPECIFIC PERFORMANCE 112-3 (1986) (hence JONES & GOODHART, S.P.). *See* 2 WHITE & TUDOR, LEADING CASES IN EQUITY, 407-8, quoting *Cottenham L.C.* in *Wood v. Rowcliffe*, 2 Ph. 382, 383 (1847); 41 E.R. 990, 991, to the effect that if a defendant breaches a fiduciary relationship, the court intervenes in regard to a chattel "of whatever description."
111. *Pusey v. Pusey*, 1 Vern 273 (1684); 23 E.R. 465. The horn had reputedly been given to the family by King Canute; 2 W. & T., L.C. 404 n. (b) gives the inscription on the horn: "Pecote" it seems should be "Pewse" and the inscription then runs: "King Knowd give Wyllam Pewse/This horn to hold by thy lond." FRY, S.P. 36-7; 3 T. PARSONS, THE LAW OF CONTRACTS 375 and n. (m), also giving U.S. cases; 11 S. WILLISTON, CONTRACT para. 1419 (p. 688 n. 2), A.L. CORBIN, CONTRACTS para. 1146 (p. 150 n. 2), KEETON & SHERIDAN, EQUITY 67, 484; HANBURY & MAUDSLEY, MODERN EQUITY 51; SNELL, PRINCIPLES 570; TREITEL, CONTRACT 788 and n. 45 (1987); CHESHIRE, FIFOOT, FURMSTON, LAW OF CONTRACT 617 n. 9; JONES & GOODHART, S.P. 112.
112. *Cf.*, *Loughborough L.C.*, *Fells v. Read*, 3 Ves. Jun. 70, 72; 30 E.R. 899.
113. FRY, S.P. 37.
114. *Nutbrown v. Thornton*, 10 Ves. Jun. 159 (1804); 32 E.R. 805, *per* Eldon L.C. at 163; 806; FRY, S.P. 37 and n. 1; 3 PARSONS, THE LAW OF CONTRACTS 374-5; TREITEL, CONTRACT 788 n. 46; R.J. SHARPE, INJUNCTIONS AND SPECIFIC PERFORMANCE 330 and n. 58 (1983) (hence SHARPE, I. & S.P.); JONES & GOODHART, S.P. 113 n. 11.
115. *Duke of Somerset v. Cookson*, 3 P. Wms. 390 (1735); 24 E.R. 1114; FRY, S.P. 37 n. 2; 2 W. & T., L.C. 405; 11 WILLISTON, CONTRACT para. 1419 (688 n. 2); 5A CORBIN, CONTRACTS para. 1146 (150 n. 2, 156 n. 14); KEETON & SHERIDAN, EQUITY 484, 67; HANBURY & MAUDSLEY, MODERN EQUITY 51 n. 5; SHARPE, I. & S.P. 331 n. 63; CHESHIRE, FIFOOT, FURMSTON, LAW OF CONTRACT 617 n. 10; JONES & GOODHART, S.P. 112.
116. *Fells v. Read*, 3 Ves. Jun. 70 (1796); 30 E.R. 899; FRY, S.P. 37 n. 2; 11 WILLISTON, CONTRACT para. 1419 (688 n. 2); 5A CORBIN, CONTRACTS para. 1146 (150 n. 2); KEETON & SHERIDAN, EQUITY 484, 67; HANBURY & MAUDSLEY, MODERN EQUITY 51 n. 5; SHARPE, I. & S.P. 331 n. 64; JONES & GOODHART, S.P. 112, 113 and n. 9.

117. *Fells*, *supra* note 116, 71-2; 899.
118. *Hall v. White*, 3 Car. & P. 134 (1827); 172 E.R. 357, *supra* chapter 9 p. 180, which was, it is true, decided after *Fells* (1796), hence the second half of the criticism.
119. *Lloyd v. Loaring*, 6 Ves. Jun. 773 (1802); 31 E.R. 1302; Fry, S.P. 37 n. 4; KEETON & SHERIDAN 484 n. 13; SHARPE, I. & S.P. 331 n. 64.
120. *Arundell v. Phipps*, 10 Ves. Jun. 139, 147, 148 (1804); 32 E.R. 797, 800-1; FRY, S.P. 37 n. 4; 5A CORBIN, CONTRACTS para. 1146 (154 n. 11); JONES & GOODHART, S.P. 112 n. 8.
121. *Lowther v. Lord Lowther*, 13 Ves. Jun. 95 (1806); 33 E.R. 230. *See* A.-G. Piggot and Winfield, *arguendo*, for defendant (96; 230-1); and 2 Ves. Jun. Supp. 324; 34 E.R. 1115; FRY, S.P. 37 n. 4; 11 WILLISTON, CONTRACT para. 1419 (688 n. 2); 5A CORBIN, CONTRACTS para. 1146 (150 n. 2); TREITEL, CONTRACT 788 n. 45; SHARPE, I. & S.P. 331 n. 62; CHESHIRE, FIFOOT, FURMSTON, LAW OF CONTRACT 617 n. 11; JONES & GOODHART, S.P. 112 n. 8.
122. *Earl of Macclesfield v. Davis*, 3 V. & B. 16 (1814); 35 E.R. 385, *per* Eldon L.C. (18; 386); 5A CORBIN, CONTRACTS para. 1146 (150 n. 2).
123. *Buxton v. Lister*, 3 Atk. 383, 384 (1746); 26 E.R. 1020, 1021; FRY, S.P. 36; 11 WILLISTON, CONTRACT para. 1419 (689 n. 4); TREITEL CONTRACT 786 n. 21; JONES & GOODHART, S.P. 113 n. 14.
124. *Cud v. Rutter*, 1 P. Wms. 570 (1719); 24 E.R. 521; *sub nomine* *Cuddee v. Rutter* 1720 5 Vin. Abr. 538, pl. 21 (a); 2 W. & T., L.C. 368.
125. *Cappur v. Harris*, Bunb. 135 (1723); 145 E.R. 623.
126. *Adderley v. Dixon*, 1 Sim. & St. 607, 610 (1824); 57 E.R. 239, 240. *See, too*, *Falcke v. Gray*, 4 Drew 651, 657-8 (1859); 62 E.R. 250, 252. SHARPE, I. & S.P. 330 n. 57; JONES & GOODHART, S.P. 113 n. 19 also cite *Dougan v. Ley* (1946) 71 C.L.R. (H.C. Aus.), where the distinction between land and chattels as non-determinative is gained from an overall reading of Dixon J.'s judgment at 150-1, rather than from any precise passage.
127. *Pooley v. Budd*, 14 Beav. 34, 43 (1851); 51 E.R. 200, 203, citing *Buxton*, *supra* note 123.
128. *Falcke v. Gray*, 4 Drew 651 (1859); 62 E.R. 250; FRY, S.P. 37; 11 WILLISTON, CONTRACT para. 1419 (688 n. 2); KEETON & SHERIDAN, EQUITY 490 and n. 41; SHARPE, I. & S.P. 331 n. 67; HANBURY & MAUDSLEY, MODERN EQUITY 51 n. 4; TREITEL, CONTRACT 788 n. 45; JONES & GOODHART, S.P. 113 n. 10, 20 n. 20.
129. *Falcke*, *supra* note 129, Kindersley V.-C. citing *Redesdale* L.C.I. in *Harnett v. Yielding*, 2 Sch. & Lef. 549; [1803-13] All E.R. 704, 705 E-F.
130. C.G. ADDISON, A TREATISE ON THE LAW OF CONTRACTS 265 (4th ed., 1856).
131. *Claringbould v. Curtis* (1852) 21 L.J. Ch. 541; FRY, S.P. 36 n. 6, 37 n. 4; 5A CORBIN, CONTRACTS para. 1146 (153 n. 9); SHARPE, I. & S.P. 332 n. 74; JONES & GOODHART, S.P. 113 n. 2.
132. *Errington v. Aynsley*, 2 Bro. C.C. 341 (1788); 29 E.R. 191.
133. *Flint v. Brandon*, 8 Ves. 159 (wrongly cited as 163) (1803); 32 E.R. 314.
134. *Lynn v. Chaters*, 2 Keen 521 (1837); 48 E.R. 728.
135. *Sutherland*, 1860, 22 D. at 671.

136. Faculty of Procurators, chapter 9 pages 184-5.
137. *Lowther*, *supra* n. 121. *See*, too, RESTATEMENT, CONTRACTS, (SECOND), s. 361, Illus. 1 (p. 172): "a painting by Rembrandt." *Contrast* Dowling v. Betjemann, 2 J. & H. 544 (1862); 70 E.R. 1175, in which the plaintiff put a value of £300 on his picture which he sought to recover; specific performance was refused. It could be argued that if a plaintiff puts a value on a Titian or a Rembrandt, that would enable damages to be quantified so that specific performance would be refused.
138. *North v. Great Northern Rlwy Co.*, 2 Giff. 64, 69 (1860); 66 E.R. 28; JONES & GOODHART, S.P. 113 n. 6. *See*, too, FRY, S.P. 39. Stuart V.-C.'s example concerned capital goods and commodities (coal waggons, coal and wheat), and he began his next sentence about the availability of injunction with the words, "Where specific things, necessary for conducting a business..."
139. *Morris v. Sparrow*, 287 S.W. 2d 583, 225 Ark. 1019 (1956) (S.C. Ark.)
140. 11 WILLISTON, CONTRACT para. 1419 and n. 1.
141. 5A CORBIN, CONTRACTS para. 1146 (150 n. 2).
142. JONES & GOODHART, S.P. 113 n. 3.
143. *McCallister v. Patton*, 215 S.W. 2d 701, 214 Ark. 293.
144. *Morris*, *supra* n. 139, at 585.
145. RESTATEMENT OF THE LAW OF CONTRACTS s. 361(b) (p. 646) and Comment (p. 648). JONES & GOODHART, S.P. 113 n. 3 cite RESTATEMENT, CONTRACTS (2d) s. 361(b), but that has no paragraph (b) and concerns the effect of a provision for liquidated damages.
146. The principle in s. 361(b) of the RESTATEMENT OF THE LAW OF CONTRACTS has been shortened to include only the heirlooms, family treasures, and works of art, and it now appears in Comment b of 3 RESTATEMENT, CONTRACTS (2d), s. 360 (pp. 171-2). The clock, shoe, and Dobbin have gone. As to the example of Dobbin, I am reminded of a friend of my parents in Basutoland who sold his old trek horse but could not bear to see the new owner maltreating it, so repurchased it for more than he had sold it.
147. *Hart v. Herwig* (1873) 8 Ch. App. 860; FRY, S.P. 37 n. 4.; 5A CORBIN, CONTRACTS para. 1146 (153 n. 9); KEETON & SHERIDAN, EQUITY 487 n. 23 (jurisdiction); HANBURY & MAUDSLEY, MODERN EQUITY 51 n. 10; SHARPE, I. & S.P. 332 n. 74; JONES & GOODHART, S.P. 114, contrasting *Hart* with *Société des Industries Métallurgiques S.A. v. Bronx Engineering Co. Ltd.* [1975] 1 Ll. Rep. 465 (C.A.).
148. *Hart*, *supra* note 147, at 866.
149. *Batthyany v. Bouch* (1881) 4 Asp. M.L.C. 380; FRY, S.P. 37 n. 4; TREITEL, CONTRACT 788 n. 46.
150. (17 & 18 Vict. c. 104).
151. Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63).
152. *Batthyany*, *supra* n. 149, at 381.
153. 44 HALSBURY'S LAWS OF ENGLAND para. 414 n. 11 (pp. 288-9). JONES & GOODHART, S.P. 121 and n. 19 confine themselves to stating that under s. 57 of the Merchant Shipping Act 1894 contractual or equitable interests may be enforced. But that "may be" is not synonymous with "will be" appears from the discussion below.

154. SHARPE, I. & S.P. 332 n. 74.
155. 2 W. & T., L.C. 385 and n. (t).
156. 3 RESTATEMENT, CONTRACTS (SECOND) s. 360, Illus. 2 (p. 172).
157. 14 GREEN'S ENCYCLOPAEDIA OF THE LAWS OF SCOTLAND 15 and n. 8 (A.R.G. McMillan, Adv., 1933).
158. *Behnke v. Bede Shipping Co. Ltd.* [1927] 1 K.B. 649; 11 WILLISTON, CONTRACT para. 1419A (694 n. 13); 5A CORBIN, CONTRACTS para. 1146 (150 n. 2, 153 n. 9); HANBURY & MAUDSLEY, MODERN EQUITY 51; SHARPE, I. & S.P. 332; TREITEL, CONTRACT 788 n. 46; JONES & GOODHART, S.P. 113 n. 2, 114 n. 14, 121 n. 18, 122 nn. 2, 3.
159. *Behnke*, *supra* note 158, at 661.
160. FRY, S.P. 37 n. 4.
161. *Behnke*, *supra* n. 158, at 661.
162. Status of Wright J. (late Lord Wright): *see* N. SINGH & R. COLINVAUX, SHIPPERS 48-9 (1967), discussing Wright J.'s decision in *Behnke*: "later to become Lord Wright and already then a most distinguished and reliable authority on shipping law." *See*, also, D.M. WALKER, INTRODUCTION TO THE SCOTTISH LEGAL SYSTEM 386-7 (5th ed., 1981).
163. *Astro Exito Navegacion S.A. v. Southland Enterprises Co. Ltd. and Another* (No. 2) [1982] 1 Q.B. 1248 (C.A.), *per* Ackner L.J. at 1266C. The case was affirmed on appeal: [1983] 2 A.C. 787.
164. Treitel, [1966] J.B.L. 211, 215, adding that *Pollard v. Clayton*, 1 K. & J. 462 (1855); 69 E.R. 540, had produced a narrower result than that in *Buxton*, *supra* n. 123. In *Pollard Page Wood V.-C.* held that the convenience of the nearness of the goods to the buyer's place of business could not in itself be the determinant in favour of specific performance (477-8; 547). *See* FRY, S.P. 39-40.
165. *Société des Industries Métallurgiques S.A. v. Bronx Engineering Co. Ltd.* [1975] Ll. Rep. 465 (C.A.); SHARPE, I. & S.P. 334 n. 80; GOODHART & JONES, S.P. 114-5, 117 n. 2.
166. *Bronx Engineering*, *supra* note 165, at 468.
167. *Id.*, *per* Buckley L.J. at 469.
168. *In re Wait* [1927] 1 Ch. 606 (C.A.).
169. *Id.*, at 630.
170. *Bronx Engineering*, *supra* n. 165, at 466; also 467, 469.
171. *Id.*, 468: "There has been no suggestion of financial inability in the defendants to satisfy such a judgment (whatever its dimensions) as might be awarded against them to cover all such items of damages as the plaintiffs could legitimately rely upon."
172. JONES & GOODHART, S.P. 114.
173. *C.N. Marine Inc. v. Stena Line A/B and Regie voor Maritiem Transport (The "Stena Nautica")* (No. 2) [1982] 2 Ll. Rep. 336 (C.A.); TREITEL, CONTRACT 788 n. 46; CHESHIRE, FIFOOT, FURMSTON, LAW OF CONTRACT 618 n. 17; JONES & GOODHART, S.P. 121-2.
174. *Stena Nautica*, *supra* note 173, at 342.
175. *Id.*, at 348.

176. *Evans Marshall & Co. Ltd. v. Bertola S.A.* [1973] 1 W.L.R. 349 (C.A.) *per* Sachs L.J. at 379H.
177. JONES & GOODHART, S.P. 114 n. 9.
178. *Eximenco Handels A.G. v. Partrederiet Oro Chief and Levantes Maritime Corporation* (The "Oro Chief") [1983] 2 Ll. Rep. 509; CHESHIRE, FIFOOT, FURMSTON, S.P. 618 n. 17; TREITEL, CONTRACT 788 n. 46.
179. *The Oro Chief*, *supra* note 178, at 521.
180. Emphasized by JONES & GOODHART, S.P. 114 n. 9.
181. *Sutherland*, 22 D., 672.
182. GLOAG, CONTRACT 656 n. 2 (*Purves v. Brock*, and *Henry v. Morrison*).
183. WALKER, CONTRACTS 541; REMEDIES 278 n. 70 (*Purves v. Brock*); 4 PRINCIPLES 282 n. 94 (*Purves v. Brock*, and *Henry v. Morrison*).
184. *Purves v. Brock*, 1867, 5 M. 1003 (1st Div.); Process Papers in W. Register House-- C.S. 46/125/7/1867.
185. *Henry v. Morrison*, 1881, 8 R. 692 (1st Div.); Process Papers C.S. 250/2945/1.
186. *S.A. rei vindicatio*: *Marcus v. Stamper & Zoutendijk* 1910 A.D. 58; *Morobane v. Bateman* 1918 A.D. 460; *Tregea v. Godart* 1939 A.D. 16; *Myaka v. Havemann* 1948 (3) S.A. 457 (A); *Gleneagles Farm Dairy v. Schoombee* 1949 (1) S.A. 830 (A); *Naik v. Panday* 1952 1 P.H. A3 (A); *John Bell & Co. Ltd. v. Esselen* 1954 (1) S.A. 147 (A); *S.A.R. & H. v. Fisher's Estate* 1954 (1) S.A. 337 (A); *Jeena v. Minister of Lands* 1955 (2) S.A. 380 (A); *Grosvenor Motors (Potchefstroom) Ltd. v. Douglas* 1956 (3) S.A. 420 (A); *Vulcan Rubber Works (Pty.) Ltd. v. S.A.R. & H.* 1958 (3) S.A. 286 (A); *Ruskin v. Thiergen* 1962 (3) S.A. 737 (A); *Johaadien v. Stanley Porter (Paarl) (Pty.) Ltd.* 1970 (1) S.A. 394 (A); *Cornelissen v. Universal Caravan Sales (Pty.) Ltd.* 1971 (3) S.A. 155 (A); *Eriksen Motors (Welkom) Ltd. v. Protea Motors, Warrenton* 1973 (3) S.A. 685 (A); *Chetty v. Naidoo* 1974 (3) S.A. 13 (A); *Standard Bank of S.A. Ltd. v. Stama (Pty.) Ltd.* 1975 (1) S.A. 730 (A); *Philip Robinson Motors (Pty.) Ltd. v. N.M. Dada (Pty.) Ltd.* 1975 (2) S.A. 420 (A); *Oakland Nominees (Pty.) Ltd. v. Gelria Mining and Investment Co. (Pty.) Ltd.* 1976 (1) S.A. 441 (A); *Van Rooyen v. Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) S.A. 835 (A); *Hefer v. Van Greuning* 1979 (4) 952 (A); and *see* *Van der Merwe v. Webb* (1883) 3 E.D.C. 97; *Muller v. Chadwick* 1906 T.S. 30; *Sookdeyi v. Sahadeo* 1952 (4) S.A. 568 (A); Magistrates' Courts Act 32 of 1944, s. 70; *Roberts and Letts v. Fynn* 1920 A.D. 23; *Cohn v. Rand Rietfontein Est. Ltd.* 1939 T.P.D. 319; VAN DER MERWE, SAKEREG 236-40, 245-53; H. SILBERBERG & J. SCHOEMAN, THE LAW OF PROPERTY 288-94, 300-22 (1983); D.L. CAREY MILLER, THE ACQUISITION & PROTECTION OF OWNERSHIP 255-325 (1986).
187. *White & Carter (Councils) Ltd. v. McGregor* 1962 S.C. (H.L.) 1. *See* introduction.
188. *Purves*, *supra* n. 184, C.S. 46/125/7/1867, interlocutor, pp. 2-3.
189. *Id.*, printed record, p. 6.
190. *Id.*, printed record, p. 7.
191. *Id.*, interlocutor, p. 3.
192. *Purves*, 1867, 5 M. 1003.
193. *Id.*, at 1004.
194. *Id.*, printed record, p. 7.

195. *Id.*, printed record, p. 9.
196. *Shotts Iron Co. v. Kerr*, 1871, 10 M. 195 (2d Div.).
197. *Id.*, at 197.
198. *Id.*, Ld. Cowan at 196-7, Ld. Benholme and L.J.-C. Moncrieff at 197.
199. *Henry*, 1881, 8 R. 692.
200. *Aberdeen v. Wilson*, 1872, 10 M. 971 (Whole Court and 1st Div.); majority opinion of the Whole Court: L.J.-C. Moncrieff, Lds. Cowan, Neaves, Jerviswoode, MacKenzie, at 972-4.
201. *Id.*, at 979.
202. *Henry*, 1881, 8 R. 693-4.

## Chapter 11: Scots Law 1889 to 1894

### Davidson v. Macpherson<sup>1</sup>

From 1879 to 1881 Macpherson had taken an improving lease on Davidson's farm, Cantraydown, in the county of Nairn, and spent large sums on improving and reclaiming the waste land on it. In March 1881 the parties agreed on a lease, a term of which bound Macpherson to bring the arable land from 220 acres up to 280 by Whitsunday 1891, at annual instalments of a tenth of the deficiency of the arable land. Between 1881 and 1886 he reclaimed twenty acres, then stopped. Davidson asked the sheriff court to appoint a man of skill who would see whether Macpherson had duly performed and, if not, ordain Macpherson to do so under this inspector's supervision; or otherwise, or if performance was not made within the period which the court laid down, to authorize Davidson himself to do the work under the inspector's supervision and, the cost of it determined, ordain Macpherson to pay it. Macpherson pleaded that the remaining waste land could not be converted into arable without huge cost which would drive him bankrupt; and that the work stoppage was justified by the agricultural depression lowering prices for produce. Sheriff-substitute Rampini allowed a proof, ordained Davidson to lead, and, as the Second Division deprecated, the record ballooned to 159 printed sides<sup>2</sup> when the matter could have been quickly decided on proper rules of procedure.

The Sheriff-substitute held that the landlord's choice of remedies was controlled by the court's discretion, judicial assistance being necessary for enforcement, and the court would not permit a man a remedy that would ruin another. A man would not be relieved from a contract causing hardship, however great, but the courts, following *Moore v. Paterson*,<sup>3</sup> would not grant specific performance if it would actually ruin the defender. Davidson had not shown that damages would not be a complete, sufficient remedy here. A court might have to order specific performance if the defender obstinately refused to perform: but here was no such refusal: Macpherson did not say, "I will not," but said, "I cannot." In *Glasgow and Inveraray Steamboat Co. v. Henderson*<sup>4</sup> it had been said that "[i]t is only in a case of something approaching to absolute necessity that the Court would be justified in taking so important a step" as decerning for specific implement. Though contracts for building a steamboat, writing a book, or doing other work differed from a lease,<sup>5</sup> Macpherson's improving lease had held the prospect of increased profits for him as well as increased rent for Davidson. So, although Macpherson's obligation was not actually impossible, in the end the land would not be improved and he, having sunk capital and all the farm profits into improvement,



would go bankrupt. Common sense suggested that the implications of specific performance, for each party, would in these changed times not make continuance of the work wise, fair, or just.

The Second Division rejected the plea. Physically the lands were no worse than in 1881; no *damnum fatale* had destroyed their substance. And the effects of the depression did not excuse Macpherson's taking the benefits of continued occupation while refusing to shoulder the burdens, particularly as he had made the lease so as to cover market fluctuations and recoup himself.

Opinions on specific implement were delivered by Lord Justice-Clerk Macdonald and Lord Young, whom it is worth quoting at length before debate. The Lord Justice-Clerk held:<sup>6</sup>

The idea of specific implement in a case of this kind is out of the question. As Lord Young pointed out in the ... discussion, specific implement cannot be enforced in almost any circumstances. All you can do is put a man in prison-- to subject him to the hardships of the law-- in order if possible to compel him to do what he is bound to do, but actually to compel him is out of the power of the law. Any judgment in this petition ordering the defender to do the work would be an order under which no punishment as for failure to fulfil a decree *ad factum praestandum* could follow. The conclusions are entirely alternative-- that he is to get an opportunity under order of Court to do the thing himself, and if he fails to do it, he is placed in the position that he shall have no answer to the demand that it shall be done at his expense.

Lord Young held:<sup>7</sup>

We have had a great deal said about specific performance as distinguished from leaving the party who is wronged to his remedy in damages. All these observations are ... quite out of place in the present case. Frequently the Court will not order specific performance where that would be hard on the party ... required to perform, and where complete justice would be done to the other party by damages. I think that may be stated as a rule. Where the other party can procure specific implement for himself with money damages awarded to him, he practically gets specific performance. If there is an obligation to deliver a certain quantity of any marketable commodity-- quite a common article which can be got in the market-- to order specific performance-- to order delivery of it-- would be inconvenient, and is never resorted to. What is done is to order payment in the form of damages, if it would enable the party against whom the breach has been committed to secure specific implement himself by going into the market and getting the article, and not compel a man to go into the market and buy goods to perform the contract. He might say-- "I am not going into the market, and you can do your worst.["] We could put him into jail for contempt, but it is far easier to order him to pay a sum of money which will enable the party he has disappointed to procure specific implement himself. But then if it is a

particular chattel-- one could give many instances-- a picture-- anything to which a peculiar and special value attaches, and where complete justice cannot be done by damages-- the Court will order specific performance, and order the party who has the article to hand it over. But that is where justice would not be done by damages, and therefore specific performance is ordered.

But we are not interested in that particular matter at all, although it is as plain as sunshine how the law stands and what is its application to the case here, for admittedly the landlord's legal right is to have 6 acres annually of the present ... waste land reclaimed. ... Now, I have said there is no question of specific performance. The object of this action is not to compel him with his own hand or by workmen employed by him to do these things. The inspector sent by the Sheriff or anybody else is not to stand over him with a whip until he does it. The purpose of the action is to declare a legal obligation on him and a legal right corresponding to it in the landlord, and to give him an opportunity of performing it himself if he is so disposed, but otherwise the alternative is to put the landlord in a condition to do it himself by authorising the access to the farm necessary for that purpose, and providing him with the money.

Comment on *Davidson* will be grouped under four heads: (1) the case did not concern specific implement of the sale of goods; (2) the case did not concern specific implement at all; (3) the compulsitor of imprisonment; and (4) the rules on the sale of goods.

**(1) The case did not concern specific implement on the sale of goods**

*Davidson* and Macpherson agreed on a lease of heritage whereby the latter would improve the waste land. A lease of heritage is not a corporeal moveable, so falls out-with the definition of "goods" in section 61(1) of the 1979 Act. For interpreting section 52, Lord Young's remarks are *obiter*.

**(2) The case did not concern specific implement at all**

This proposition by Lord Justice-Clerk Macdonald and Lord Young is awkward. My introductory chapter defined specific implement as the court's decree ordaining the defender to do what the contract obliges him to do. The decree may be enforced, if necessary, by the imprisonment of the defender or by the court's authorizing its appointee to perform the obligation in the defender's stead. The Second Division's ruling in *Davidson* that it would not imprison Macpherson on the petition does not necessarily imply that it did not decree specific implement. He was offered the choice of doing the reclamation, otherwise paying damages. A choice implies at least two alternatives. Damages was one, in the form of reimbursing Davidson for reclamation that Macpherson might balk. The other alternative could not have been declarator. A declarator confirms the existence of a legal obligation but does not order the defender to perform

the obligation.<sup>8</sup> Here a declarator would have confirmed that the lease bound Macpherson to reclaim waste land on Cantraydown. But the Second Division's interlocutor went further:<sup>9</sup>

Therefore ordain the defender forthwith, at the sight of and to the satisfaction of Robert Black, civil engineer, Inverness, (1) to improve, reclaim, and bring under proper cultivation, in terms of the said lease, 10 acres of the pasture or waste land on the farm Cantraydown, being the quantity which the defender was bound to reclaim at the date of raising the present action; enforce implement, if necessary, of the defender's obligation contained in the said lease to reclaim the remaining portion of the waste or pasture land on the said farm necessary to make up the 280 acres stipulated for: Remit to the said Robert Black to see the said works performed to his satisfaction, and to report quarterly the progress made by the defender with the execution of the said works...

The appropriate form of the alternative was specific implement.

Despite Lord Justice-Clerk Macdonald's denial that the case concerned specific implement, his later analysis of the effects of Macpherson's obeying or disobeying the Second Division makes sense only if the first alternative was specific implement: "If he fulfils his obligation under the order of the Court, there is an end of the case."<sup>10</sup> Had Davidson restricted his claim to damages after cancelling the lease, the lease would have been ended: attempted reclamation work by Macpherson could not have kept alive the dead lease, and there would not have been an end of the case, because Macpherson's further performance would not have complied with a decree for damages.

### (3) The compulsitor of imprisonment

Lord Justice-Clerk Macdonald said that here decree could not be followed by punishment as for failure to fulfil a decree *ad factum praestandum*. On the basis that the decree offered the alternatives of specific implement or damages, if Macpherson had chosen damages he would have had to repay Davidson the cost of the reclamation. The cost would have been a money sum, and Macpherson would have been shielded by section 4 of the Debtors (Scotland) Act 1880, which, with certain exceptions, abolished civil imprisonment for debt. But the Lord Justice-Clerk's proposition would not be invariably correct if we imagine the situation where, before Davidson had begun the reclamation, Macpherson had said to himself, "Either way, I'm done for: either I do the work myself, and drive myself bankrupt with the high cost of it which I can't recoup from low prices for the farm produce; or I don't do the work, Davidson goes ahead with it, and then claims reimbursement with a bill so high that he drives me bankrupt. I'll

tell him that I won't do the work and I won't reimburse him." It is thought that Davidson would then had been entitled to choose between two courses of action. He could cancel the lease, have Macpherson ejected, and sue for damages, the award of which would be enforced by seizure and judicial sale of Macpherson's moveables, the proceeds going to defray the award. Or Davidson might choose to keep Macpherson on as tenant, but test whether the threat or the reality of imprisonment would conquer his obstinacy in refusing to continue the work.

#### (4) The rules on the sale of goods

Lord Young's remarks<sup>7</sup> on specific implement of the sale of goods accord with Lord Cowan's in *Sutherland*<sup>45</sup> rather than with *Stair*, *Bell*, *Brown*, *Watt*, and the other Scots cases like it, and the Mercantile Law Commission. In his opinion, the remedy will lie for a particular, special article, for the non-delivery of which damages would not suffice. Further, he posits that it is owned or possessed by the defender and is therefore to be contrasted with the common, marketable commodity for the acquisition of which damages are sufficient and which, we note from Lord Young's hypothesis,<sup>7</sup> the defender does not own or possess when making the contract, for he obstinately declares: "I am not going into the market...." This *obiter* restriction of the remedy to goods in the defender's ownership or possession seems to limit or at least to clash with the *obiter dictum* of Lord Medwyn in *Watt*<sup>11</sup> that specific implement remains the principle of Scots law. But it is in turn subject to the later pronouncements of the House of Lords in *Stewart v. Kennedy*<sup>12</sup> and indeed appears narrower than the terms of section 52(1) of the 1979 Act, in which the adjective "ascertained" contemplates goods which, not being specific at the time of the contract, may therefore be outwith the defender's ownership or possession.

There is a third group of goods which Lord Young<sup>7</sup> did not cover expressly: commodities which are or may be rendered specific but remain neither unique nor exceptionally valuable, so that the loss arising from their non-delivery would be quantifiable in damages, which would, according to Lord Young's rule, be an adequate remedy excluding specific implement. But this result would conflict with that of *Linn v. Shields* (1863),<sup>13</sup> decided after *Sutherland*<sup>14</sup> and ignored by the Second Division in *Davidson* and by Gloag and Walker. What is striking is that the judgment was delivered by Lord Justice-Clerk Inglis, who in *Sutherland*<sup>15</sup> had concurred with Lord Cowan but not expressly agreed with the latter's views on specific implement. In *Linn* the goods were specific-- individualized and defined-- but were neither unique nor so valuable that

damages would not have sufficed. Linn concluded for:<sup>16</sup>

delivery ... of nine stacks of corn ..., being the remainder of twelve stacks of corn, purchased by the pursuer from the defender at the price of L.11 sterling each stack, and which the defender has refused to give delivery of; the pursuer being ready and willing to pay the price thereof in the end of the month of April next, when payable in terms of the contract of sale, and the pursuer being further ready and willing to pay the price on complete delivery of said twelve corn-stacks; or otherwise, on the defender failing to give delivery ... of the ... corn-stacks, upon payment ... as aforesaid, the defender ought to be decerned to pay to the pursuer ... L.80 sterling, being damages sustained by the pursuer, or which he may sustain in consequence of the defender's breach of contract, in his wrongful failure to deliver to the pursuer the ... nine stacks of corn.

The contract had been made on 27 February, when Linn was shown twelve stacks of corn in Shields's stack-yard at Byers: the parties were agreed on the particular corn governed by the contract, and that corn was owned by Shields. The dispute turned on the mode of payment, and the details do not concern us here. The Sheriff-substitute held that as the parties had never agreed on the terms of payment, there was no complete bargain "the performance and implement of which either party can enforce,"<sup>17</sup> and Shields must be assoilzied but allowed to claim the price of the three bags already delivered. The Sheriff held the parties bound by "an ordinary contract of sale, complete in all its essential elements, viz. the ascertainment of the subject"<sup>18</sup> and the other elements; the parties were bound to deliver the corn and pay the price; the mode of payment should be determined by the law of the land, and Shields would enjoy the *exceptio non adimpleti contractus* until Linn paid; and the court therefore "ordains [Shields] to make to [Linn] delivery of, the nine stacks which remain undelivered, on payment by him of the stipulated price of L.11 each."<sup>18</sup> The action and decree were for specific implement.

To the parties' lawyers the sheriff sent<sup>19</sup> a copy of the unreported decision in the very similar case of *Aiton v. Grahame*, 26 January, 1858,<sup>20</sup> which he thought most relevant to the dispute in *Linn*. Aiton had summonsed Grahame to deliver two ricks of hay, part of four bought in December 1853 but later withheld. A damages claim was reserved.<sup>21</sup> The First Division found that Grahame was bound to deliver the two ricks outstanding, and Aiton to pay their price; decerned in terms of the conclusions of the summons, reserving the damages action; and decerned in terms of the conclusions of Grahame's cross-action for payment of the price.<sup>22</sup> The sheriff's recommendation in *Linn* was therefore cogent. It is also noteworthy that *Aiton* had preceded *Sutherland* by

only two years; and that Lord Justice-Clerk Inglis participated in both *Sutherland* and *Linn*, yet nowhere in the documents, judgment, or interlocutor of *Linn* is there any reference to *Sutherland*.

In *Linn* Lord Justice-Clerk Inglis held that both parties had in some respects misapprehended their contractual rights but the Sheriff had correctly decided that *Linn* should have decree for delivery on payment of the price.<sup>23</sup> The ruling on damages, though, needed correction:<sup>24</sup>

There are three kinds of conclusions for damages which might be inserted in a summons of this kind. First, a conclusion for damages over and above performance, in respect of an injury to the subject, or loss by delay. A second is for damages in place of delivery. But there is a third, which is alternative, and occurs in a summons demanding either performance of a contract, or damages for breach of it. The Sheriff has misread this conclusion as being of the first kind. I think we ought to recal that part of his interlocutor, and decern for performance, without disposing of the conclusion for damages.

This decision indicates that the first alternative was specific implement, confirms that the sale of an ordinary marketable commodity owned by the seller falls within the scope of the remedy, and conforms with the general principle expressed by Stair.<sup>25</sup> As the commodity was individualized at the making of the contract, *Linn* does not directly support Bell's proposition that the seller can be constrained to separate fungibles:<sup>26</sup> that is a further step, on which the court must rule: but *Linn* would help the pursuer rebut a plea that as the court refuses specific implement of a contract relating to commodities if damages suffice, ordaining the delivery of fungibles yet to be individualized would be vain. The court might proceed to hold that the defender has power over what he owns and should be ordained to exercise it as the contract requires, by separating and delivering fungibles sold. Gow<sup>27</sup> and R. Brown<sup>28</sup> refer to Wright's proposition (1872):<sup>29</sup>

In Scotland, the right to compel delivery is competent to a buyer although the goods are not specific, if it be in the power of the seller to make them so and deliver them. If, for instance, the sale be a part of a whole, the seller may be compelled to separate and deliver without the option of paying damages for breach of contract and retaining the goods.

Unfortunately, Wright gave no authority for this. He later<sup>30</sup> discussed *Wyper v. Harveys* (1861),<sup>31</sup> in which the leading judgment of the Whole Court on the effect of sections 1 to 3 of the Mercantile Law Amendment (Scotland) Act 1856<sup>32</sup> was delivered by Lord Justice-Clerk Inglis,<sup>33</sup> who expounded the law on the seller's obligation of delivery

as follows:<sup>34</sup>

No doubt, the subject of the contract of sale being moveables, *in forma specifica*, the pursuer has what is called *jus ad rem*. But "*jus ad rem* is that indirect right which we have to a thing, in consequence of an engagement, express or implied, by the person holding the real right, to transfer or deliver it; and which entitles us only to an action directed personally against him, for enforcing his obligation, and compelling him to deliver the thing if in his possession, or to indemnify us for the loss of it, if it is gone."...

When, therefore, the buyer makes a subsale of a specific subject or *corpus* left in the hands of the original seller, what does he give or contract to give to the purchaser? ... He gives, or contracts to give, the sub-purchaser, what alone he has, a *jus ad rem*, which is a *jus crediti* in a personal action for delivery of the goods.

Dissenting from the other judges' view of the sub-buyer's right to enforce delivery of the goods retained by the first seller after the buyer's bankruptcy, Lord Deas had this to say on specific implement:<sup>35</sup>

Where the article sold is specific, I take it that there is no doubt that the doctrine of Pothier (*Contr. de vente*, No. 68) is the doctrine of the law of Scotland-- that, if it is within his power, the seller must deliver the article, which has been paid for, and is not entitled to satisfy his obligation by offering damages.

Having quoted Erskine *Inst.* 3.3.7 on risk, Lord Deas went on:<sup>36</sup>

This peculiarity in the position of a debtor for delivery of a special subject brings out very clearly the difference between the position of a purchaser, as creditor for such delivery, and the position of a creditor in a money obligation, or an obligation to deliver goods which are not specific-- as so much flax of a certain kind, or so much wine of a certain vintage. The creditor, in the money or indefinite obligation, can only rank for his debt. But the creditor for delivery of a specific article, if he has fulfilled his counter obligations, is entitled to specific implement. His right to delivery is absolute, except ... against the right of retention of the undivested owner.

Lord Justice-Clerk Inglis's expression, "moveables, *in forma specifica*," appears to mean the same as Lord Deas's "specific goods" and both judges would limit the remedy to "specific goods." But would this class include, for example, future goods adequately described and falling within the scope of the seller's power of production, such as "your next year's crop from Y. field on your farm"? Pothier's *numero*<sup>37</sup> speaks of "la chose vendue" and his previous *article 1<sup>er</sup>*, "De la chose vendue,"<sup>38</sup> mentions that there may

be sales of future goods conditional upon their later coming in existence,<sup>38</sup> and sales of goods not owned by the seller.<sup>39</sup> As to the first, an action for specific implement presents the snag that although fictional fulfilment of the suspensive condition operates when the seller wilfully fails to deliver, there is no article which the court can ordain him to deliver. As to the second, however, since "la propriété" is not identical with "la possession," specific implement would seem competent: Pothier says:<sup>40</sup>

[J]e pense qu'en cas de la refus par le vendeur de livrer la chose vendue qu'il a en sa possession, le juge peut permettre à l'acheteur de la saisir et de l'enlever, si c'est un meuble....

On the basis that the judge would only permit the seizure if the moveables were sufficiently identified and therefore individualized, Pothier obliquely supports the limitation of the remedy to specific goods. Section 1 of the 1856 Act protected buyers of goods "sold but not yet delivered"; and in *Wyper* the Whole Court appeared to interpret "sold" as meaning "goods subject to an *emptio perfecta* entitling the buyer to a *ius ad rem* over them"-- an inference confirmed twenty-five years later in *Seath v. Moore*<sup>41</sup> by Lord Watson,<sup>42</sup> who held that the Scots seller's appropriating a specific chattel, and the buyer's accepting it, perfected the sale, gave the buyer the personal right to demand its delivery from the seller, and shifted the risk onto the buyer.<sup>43</sup> Lord Watson impliedly overruled Bell's proposition<sup>26</sup> that the seller may be compelled to appropriate the goods, for they have to be appropriated, separated from other fungibles, before the sale is *perfecta*. Lord Watson's analysis is so general that one cannot even limit it to the facts of *Seath*, which involved the seller's bankruptcy, and try to argue that the stress on "specific" goods as a requirement for specific implement was only laid after the 1856 Act was passed to redress inequity arising out of bankruptcy.<sup>44</sup> The argument would urge that *emptiones perfectae* will be specifically enforced; but *emptiones* need not be *perfectae* to be specifically enforced: *emptiones* will be specifically enforced if the goods are in the seller's possession. In the result, Wright's article suffers from an inherent contradiction between his unsubstantiated proposition on specific implement<sup>29</sup> and the rulings in *Wyper*<sup>31</sup> which he failed to connect with it; read now with *Seath*,<sup>43</sup> it is incorrect.

One significant aspect of *Seath*<sup>43</sup> is that Lord Watson did not limit specific implement to *emptiones perfectae* of unique or exceptionally valuable goods. Commodities once separated from others of their class fall within the scope of the remedy. *Linn* accords with his ruling.

How does the *ratio* of *Linn* stand in relation to *Sutherland*<sup>45</sup> and *Davidson*?<sup>46</sup>



The statements in those cases were *obiter* and, as to specific commodities neither unique nor exceptionally valuable, are overruled unless they can be distinguished or resolved. One could argue that Lord Young's *dicta*<sup>47</sup> were limited by the rider that specific performance would be hard on or inconvenient to the defender; features absent from *Linn*, where Shields appeared not to have thought delivery of the nine stacks to be hard or unfair, provided that he was paid. Inconvenience may result from varying circumstances: continued performance to the pursuer, though profitable enough, might not be as profitable for the defender as a new contract with a stranger offering more money; or continued performance might ruin the defender beset by rising overheads and falling profits. If the former, the Anglo-American theory of damages fits with what proponents of the economic theory of law call efficient breach of contract:<sup>48</sup> the defendant is free to break his contract and pay damages from his profit on a second with someone valuing his performance more highly, and specific performance should be refused as a drag on market forces. The general principle making specific implement competent unless impossible or unfair does not acknowledge that, as continued performance may be less profitable to the defender, the remedy may be a drag on the market. This economic aspect, implicit in the rulings of Lords Cowan<sup>49</sup> and Young,<sup>50</sup> has not been expressly discussed in the Court of Session or the House of Lords in a Scots case and the conflict with the general principle resolved.

In the second set of circumstances, where the remedy would be inconvenient because ruinous to the defender, the Second Division in *Davidson* reserved a discretion to refuse the remedy and award damages. This seems the gist of Lord Young's remarks on hardness and inconvenience.<sup>50</sup> In that case, Macpherson not being absolved from his duty of reclamation but, on the above analysis, given the alternatives of specific implement or damages, why should the lessee in possession have specific implement granted against him, if only in the alternative, while the seller of goods is let off with no decree of specific implement against him and the chance of paying for his liberty from contract with damages? Perhaps an answer lies in the factual difference that, whereas the seller takes no benefit from the buyer, can return the price if that has been paid in advance, and can perform without needing the buyer's cooperation, merely having to place the goods at the latter's disposal, the lessee continues to enjoy the benefit of occupying the premises and by that occupation is presented with the spatial means of doing the work which an improving lease requires of him. The seller who halts performance when overheads are swallowing profits may find himself paying damages if his overheads exceed those of his rivals getting higher prices for the equivalent goods than he can. But

he may find himself paying no damages if higher overheads and declining profits dog his rivals too, the market for the particular goods having slumped. In what would then be a buyer's market, some sellers might drop prices still further to bring quicker returns; it would be a naïf who insisted on specific implement if from a second seller he could obtain goods of the same quality, at a lower price, perhaps with more attractive inducements and advantages thrown into the bargain. So it is rather in the first set of circumstances outlined in the previous paragraph, the seller's market of high prices and scarce goods, that the buyer would be anxious for specific implement, as a way of sharing in the seller's expectations of increasing profits: acquiring the goods yields a good investment, maximization follows from successful resale.

### Stewart v. Kennedy

The year after *Davidson* came the leading case, *Stewart v. Kennedy* (1890),<sup>51</sup> in which the House of Lords confirmed specific implement as one of the ordinary legal remedies claimable by the pursuer unless shown to be impossible or to require refusal by the court in the equitable exercise of its discretion. Lord Watson<sup>52</sup> held that the pursuer could not be compelled to accept damages rather than the remedy, and that he did not know of any case in which the court had exercised its discretion so as to refuse it. Had the Second Division in *Davidson* erred in holding that case to have nothing to do with the remedy; or did Lord Watson overlook *Davidson*? The answer is thought to be that, whatever was said in *Davidson* about unfairness and inconvenience, the Second Division did not exercise its discretion to refuse the remedy.<sup>53</sup> Seeking to distinguish *Stewart*, supporters of *Sutherland* and *Davidson* might argue that it concerned not moveables but heritage, so its speeches can only be *obiter dicta* for sales of moveables. Against this it could be argued that the speeches flow in the broadest terms, contrasting English remedy with Scots remedy, and in a magisterial exposition of the Scots remedy it would be strange if the highest civil court omitted all mention of a glaring exception. No mention, comes the rejoinder, of those other glaring exceptions, the exclusion of money claims by the Debtors (Scotland) Act 1880 and contracts of personal service<sup>54</sup>: these having gone unmentioned, *Stewart* was meant to govern only sales of land. If bested on this line of argument, *Sutherland* supporters might concede that, as Scots law is stated in general principles rather than being constructed from a coral reef of cases, the rules on specific implement of sales of goods might be brought within one of Lord Watson's exceptions in *Stewart*, refusal on equitable grounds, damages being adequate for sales of all except unique or exceptionally valuable goods.















In the First Division's judgment, Lord President Dunedin described the initial writ as being for delivery and, failing such delivery, for damages.<sup>5</sup> He doubted whether the pursuers had understood the Sheriff; at any event, they had amended the summons to include a simple alternative conclusion for £1000, an amendment unnecessary, indeed pointless, Lord Adam having ruled in *Morley v. Jackson*<sup>6</sup> that an original lack of jurisdiction could not be cured by amendment to the summons. For arrestment *ad fundandam jurisdictionem*, the origin of the institution remained the test of its competence: the pursuer must get hold of something which would satisfy the judgment.<sup>7</sup>

It follows ... that, if what you are asking from the Court is some class of decree which never can be worked out in money, then you cannot suppose that there will be a jurisdiction of the Court founded upon an arrestment of money the original use of which was merely to satisfy the judgment. But I think it is really a mistake to call the decree that is asked for in this action, an ordinary action founded upon breach of contract, a decree *ad factum praestandum* at all. There is no difficulty at all in working out this judgment in money.

Reminding ourselves that in *Stewart*<sup>8</sup> the House of Lords had held specific implement to be an ordinary remedy, and inferring thence that an ordinary remedy is sought by an ordinary action for breach of contract, we consider Lord President Dunedin's statement on specific implement, which may with advantage be shown in the context of the paragraph in which it was stated:<sup>9</sup>

It is argued that this is an action *ad factum praestandum*, and that the subjects arrested cannot satisfy the judgment in such an action. Now, it seems to me that when a person asks for delivery of a specific article of which there is a *pretium affectionis*, the decree that he wants is the true decree for specific performance; but when he says to the other person, "We have a contract: under that contract you are bound to deliver; you have not delivered; deliver or else pay damages," he is not asking for a decree *ad factum praestandum* in the proper sense at all. I think the absurdity of the situation can be illustrated by supposing that this had been an ordinary action in the Court of Session with a conclusion in the same form as the prayer of this initial writ, and that no question of jurisdiction had been raised, but decree in absence pronounced. The decree in absence would be a decree in terms of the conclusions of the summons, and the extract would echo the conclusions of the summons. Does anyone suppose that, if a person holding that decree had gone to a messenger and told him to charge upon the first portion of the summons, namely, that which asked for delivery, and had then come back to the Court, after delivery had not been implemented, that he would then have got from the Court a warrant for imprisonment? Such a thing would be absolutely inconceivable. And so the argument for the appellants really comes to this: it is incompetent because, being an Englishman, a Scotch

Court could never do against him what it never would do against a Scotsman. The truth is that a person who comes and asks for a decree of this sort is not asking for a decree of specific performance at all. He is saying, "There is a contract between us, you have broken it; I am content with your giving me either what I am entitled to under the contract or, if not, paying damages."

Discussion will be grouped under four main headings:

- I. The nature of the claim for specific implement, failing which, damages.
- II. The inconceivability of imprisonment.
- III. Comparisons with English and South African law on the nature of the claims involving specific performance and damages.
- IV. The *dictum* that specific implement is confined to specific goods with a *pretium affectionis*.

#### I. The nature of the claim for specific implement, failing which, damages

With the claim for a specific article bearing a *pretium affectionis* Lord President Dunedin expressly contrasted the claim for delivery of an article or damages. This added claim for damages seemed to form the ground of his distinction: we infer that the claim for a specific article bearing a *pretium affectionis* has no such claim for damages, otherwise damages would be quantifiable and the article would lack a *pretium affectionis*. Moreover, the claim for specific implement or damages was not for decree *ad factum praestandum*, he ruled, because it offered the defender the choice between satisfying the decree by doing what the contract bound him to do, and paying damages for not doing so. This interpretation is theoretically supportable if the summons contains directly alternative claims lacking hierarchy between themselves:<sup>10</sup> "either ... or", for example, and "x, alternatively, y"; but it misapprehends what Union Electric actually said in the initial writ before it was amended,<sup>2</sup> and, indeed, it conflicts with the Lord President's own summary of the claim:<sup>5</sup> "ordain the defenders to deliver ...; and failing the defenders so delivering the same to grant decree ... for ... payment of £1000...." The important difference between the forms of claim is the phrase "failing the defenders so delivering", which declared Union Electric's preference for specific implement, and their willingness to accept damages only if specific implement was impossible or was refused by the court in the exercise of its discretion. Holman's interpretation of the claim in this way emerges from the amended plea about "the *ad factum praestandum* conclusions still sought *primo*."<sup>4</sup> The amendment to the initial writ might have turned the claim into an "either x or y" claim; but the amendment did not

create jurisdiction to bring or to decide the claim,<sup>5</sup> so may be disregarded.

Lord President Dunedin held that the decree sought was not really *ad factum praestandum* at all. It is submitted that his view conflicted with statute. A decree for specific implement of a contract is a decree *ad factum praestandum*. Section 52 of the Sale of Goods Acts 1893 and 1979 refers to a judgment or decree for delivery of specific or ascertained goods. What is now subsection (3) provides that "the judgment or decree may be unconditional, or on such terms or conditions as to damages, payment of the price and otherwise as seem just to the court." The subsection assumes that the judgment or decree remains one for delivery of specific or ascertained goods. The Lord President's view in effect requires the decree to be unconditional if it is to be really *ad factum praestandum*: a view that would strike out the second clause from "or" to "the court." Even if this view represented Scots law before 1894, it was excluded once the Act became applicable to Scotland: subsection (4) provides that section 52 supplements the right of specific implement in Scotland.

The Lord President's views also conflicted with Scots law before 1894. In *Seaforth's Trustees v. Macaulay* (1844) the pursuer claimed specific implement of a lease of Lewis farms, "Alternatively ... £200 yearly, as the loss the pursuer would sustain, in the event of the trustees failing to fulfil the agreement...."; and had raised inhibition on the dependence to prevent their disposing of the land to Mathieson of Achany.<sup>11</sup> The Second Division refused to recall the inhibition. Lord Justice-Clerk Hope held:<sup>12</sup>

I cannot see how Dr Macaulay is prevented from claiming implement. It is new to me that a pursuer claiming implement, and alternatively damages, is not to be entitled to say-- I prefer implement. ... Dr Macaulay has a legal right. His right of tack is as good in law as the right of the proprietor. He is perfectly entitled to say, I do not choose to take the damages-- I prefer to insist for implement.

Lord Medwyn agreed: "I cannot understand that a party, when he asks for implement, and also inserts a claim for damages, is to have nothing but the damages given to him." And Lord Moncrieff would not recall the inhibition, "because that would be just determining the question whether the pursuer is entitled to specific implement or not."<sup>13</sup> And in *Dickson v. Bryan* (1889) the First Division refused to interfere with a Sheriff's interlocutor granting warrant to imprison Bryan till he restored poinded goods or paid double their appraised value.<sup>14</sup> Lord President Inglis held:<sup>15</sup>

The prayer is not like the alternative prayer of a summons where the pursuer asks specific implement or damages in the event of failure, for in such a summons the option lies with the pursuer; here, on the other hand, the option is entirely in the hands of the defender; he can, if he chooses, pay the sum and put an end to the process.

Finally, in the leading case of *Stewart v. Kennedy* (1890)<sup>16</sup> Kennedy claimed execution of a formal disposition of the subjects according to the contract; "and failing implement of the foresaid contract, the said defender ought and should be decerned, by decree foresaid, to make payment to the pursuers of the sum of £50,000 sterling, in name of damages."<sup>17</sup> Lord Watson held:<sup>18</sup>

[I]n Scotland the breach of a contract for the sale of a specific thing such as a landed estate gives the party aggrieved the legal right to sue for implement, and although he may elect to do so, he cannot be compelled to resort to the alternative of an action for damages unless specific implement is shown to be impossible, in which case *loco facti subit damnum et interesse*.

In general, therefore, the choice between specific implement and damages remained the pursuer's. The rider about impossibility would have applied to *Union Electric* because the Inferior Courts Judgments Extension Act 1882 was limited to money judgments, and decree for specific implement against the English company, Holman, could not have been enforced. Lord Dunedin, however, inverted Lord Watson's rule so as to give the choice of remedies to the defender, even where impossibility of performance was absent. The unanimous decision of the House of Lords in *Stewart* outranks the First Division's in *Union Electric*, which is therefore incorrect.

In this error the First Division was not alone. *Armour v. Martin*<sup>19</sup> was an action in the Sheriff Court of Lanarkshire for decree of delivery of thirty ordinary, fully-paid, £1 shares in Sawers, Limited, numbers 49,421 to 49,450 inclusive; for interdict against the sale of these shares; and, failing delivery of them, for payment of £50 sterling with interest. Sheriff Guthrie observed<sup>20</sup> that

an argument has been submitted founding on the practice of this and other Sheriff Courts, ... that no decree *ad factum praestandum* can be enforced in the normal manner by charge and imprisonment if the petition under which it is obtained contains a pecuniary conclusion failing performance. The idea seems to be that, by putting his case in that form, a pursuer shuts himself up to take a money decree if the defender does not obey an order made under the primary or leading prayer, and that the defender acquires a vested immunity from the ordinary consequences of disobedience.

There is no doubt that there has been a widespread impression that this is

so, and I confess that, in compliance with practice, I have myself said as Sheriff-substitute that one who wants to enforce specific performance by imprisonment must not add an alternative pecuniary craving. In the Sheriff Court of Midlothian, also, I believe that a similar view has been taken, with, I think, this distinction, that if the petition asks for an order, *e.g.*, to deliver, "or alternatively" to pay, instead of "failing delivery" to pay, the pursuer may be entitled to an enforceable decree under the leading conclusion. There are also some passages in text books to a like effect, including a passage for which I am myself responsible in the last edition of Bell's Principles, sec. 29.

On examination I am obliged to hold, notwithstanding my great respect for the Sheriffs and others who, like myself, have been misled by an erroneous impression derived from the practice, that there is no ground of principle or authority for the doctrine under discussion. It appears to me that the alternative prayer, in whatever form it may be, is introduced simply to meet the possibility of the Court refusing to order specific implement of the obligation on which the action is laid. For it is a fundamental rule that the Court in each case will exercise a discretion as to granting or refusing this equitable remedy.

A decision by the Sheriff Court of Lanarkshire in 1904 would not, of course, have bound the First Division in 1913; but if the report had been read it would have given Lord Dunedin cause to doubt his confident assertion that the claim was not actually for decree *ad factum praestandum* at all: Sheriff Guthrie followed two important decisions of the Court of Session: *Aberdeen v. Wilson*<sup>21</sup> and *Middleton v. Leslie*.<sup>22</sup>

In *Aberdeen*, we recall,<sup>23</sup> the pursuer alleged that the defenders had wrongfully removed fleeces and he concluded for delivery, failing which, payment of £20. A majority of the Whole Court held:<sup>24</sup>

The primary conclusion is *ad factum praestandum*, and had no appearance been made for the defender decree to that effect could have been obtained by the pursuer, on which diligence might have followed to enforce delivery. This is of the very essence of the action. No doubt the defender may appear and shew that he cannot implement the demand for delivery, and thus the pursuer must have recourse to the alternative pecuniary conclusion.... The petitioner may ... enforce delivery of his property *in forma specifica*. In the event of delivery being impossible, or, where possible, the demand for delivery not being complied with, he is ... entitled, according to our forms of process, to conclude for a modified sum in the event of no opposition being made, and alternatively, in the event of opposition, which may lead to protracted litigation, for such larger sum as in the course of the cause he may prove to be the true value of his property.

One concedes that in *Aberdeen* the pursuer sought the return of what he owned, and that in *Union Electric*, if the view is taken that the passing of property under the 1893 and 1979 Acts is not the passing of ownership or that, even if it is, the carbons in *Union*

*Electric* had not been ascertained, then Union Electric was suing not in property but in contract. But it remains significant that the conclusions in *Aberdeen* and *Union Electric* were similar and in the earlier case had been classified as being primarily for decree *ad factum praestandum*.

Moreover, Lord Dunedin's opinion conflicted with the *rationes decidendi* of *Shotts Iron Co. v. Kerr*<sup>25</sup> and *Linn v. Shields*.<sup>26</sup> In the latter, Lord Justice-Clerk Inglis decerned in terms of the conclusions of the summons against Shields, ordaining delivery of the nine stacks upon Linn's making payment; and, finding that the grounds of the conclusion for damages no longer existed, he dismissed that part of the claim. All that remained, therefore, was the decree for delivery: and a decree for delivery of goods sold is a decree *ad factum praestandum*.

*Middleton v. Leslie* was followed by the Second Division in a case decided fifteen years after *Union Electric* and which strengthens the argument that Lord Dunedin's view was incorrect. In *McKellar v. Dallas's, Ltd* (1928),<sup>27</sup> where the defender had not fulfilled an obligation to build a house fronting Great Western Road in Glasgow, the pursuer concluded (1) for declarator of the validity of the agreement; (2) for decree of specific implement of the obligation to build; and (3) for damages in the event of the defender's not implementing the agreement within the time appointed by the Court.<sup>28</sup> In a process of suspension of the charge following upon decree granted by the Lord Ordinary, the defender-complainer averred, *inter alia*, that the form of the second and third grounds of relief intimated that the pursuers had chosen to enforce damages, in particular because more than a year's delay had elapsed between the Lord Ordinary's issuing his interlocutor for implement on 20 March, 1926, and the pursuer's charging the defender on 13 May, 1927, to erect the house within fifteen days.

In the suspension process the Lord Ordinary (Constable) held<sup>29</sup> that the pursuer's conclusions followed usual practice and the form of action for implement in the *Juridical Styles*.<sup>30</sup> The pursuer should not be held to have elected to take one of the alternative remedies set out in the conclusions: such practicalities as the need to solve a genuine dispute over the terms of the agreement, or the defender's inability to implement the obligation, would make it advisable that, in the former situation, after the court's decree the defender should be able willingly to implement his obligations by a deferred date with the pursuer's consent, and that, in the latter situation, the pursuer should be able to fall back on a damages claim. Further, authority substantially negatived McKellar's plea that Dallas's had in effect chosen damages: *Moore v. Paterson* (1881)<sup>31</sup> and *Middleton* (1892)<sup>32</sup> had contained conclusions for implement,

failing which, damages: in *Moore* the court expressed the opinion that this form of claim in respect of an enforceable obligation was competent even though the court might later exercise its discretion to refuse implement, awarding damages instead; and in *Middleton* the court decreed implement, within an extended period, of an obligation to build a house.

McKellar having then appealed, the Second Division confirmed Lord Constable's analysis and considered this form of claim under the headings of competence and timeliness. Regarding competence, Lord Justice-Clerk Alness<sup>33</sup> and Lord Anderson<sup>34</sup> held that the claim was in the common form adopted in *Middleton*, Lord Anderson citing *Moore* and the *Juridical Styles* as well. The Lord Justice-Clerk shrewdly observed<sup>33</sup> that McKellar himself was under no illusion that the thrust of the action was specific implement (just as Holman, we may add, had been under no illusion that the thrust of Union Electric's action was specific implement<sup>4</sup>), and held that it was quite impossible to adopt McKellar's suggestion that the conclusion for implement should be struck out in favour of the one for damages. Lord Anderson remarked<sup>34</sup> that the suggestion rendered the implement claim superfluous and incompetent: and "an order for implement (if it had been pronounced) is meaningless if the reclaimers are tied up to a claim for damages." Lord Hunter doubted<sup>35</sup> the intelligibility of McKellar's plea. The passage most strongly contradicting Lord Dunedin in *Union Electric*<sup>9</sup> was Lord Anderson's,<sup>36</sup> that

the judicial opinions in [*Moore* and *Middleton*] recognize that under this form of summons the pursuer has the option to crave implement or to claim damages. In the present case there is no doubt that the reclaimers made their election in favour of a crave for implement, and the Lord Ordinary meant to grant their motion for an order for implement. If he has done so, the reclaimers are entitled to exhaust the possibilities of this remedy before having recourse to the third conclusion of the summons, which is concerned with damages.

Regarding timeliness, the Second Division's approach is gathered from the words of Lord Ormidale:<sup>37</sup>

As I understand [McKellar's counsel], he was disposed to admit that, if the charge had been timeously given, the complainer would not have been entitled to dispute that the sanction of imprisonment was available to the respondents; but that, decree for implement having been given, and the respondents having allowed the time granted to elapse without taking further action, they must be held to have elected to claim damages. ... [H]owever, the charge was ... timeously given, and the respondents did all that was

required of them, without prejudice to their right to enforce the decree *ad factum praestandum* in the usual way.

*McKellar, Moore, Middleton, Stewart, Shotts Iron*, and *Linn* form a pattern, so that Lord Dunedin's failure to discuss the earlier cases and his divergence from their clear line of authority reveals his judgment in *Union Electric* as flawed.

## II. The inconceivability of imprisonment

Lord Dunedin then introduced<sup>9</sup> into the discussion the element of imprisonment, holding that if a defender charged upon the first part of the summons failed to implement the decree in absence, a court could not conceivably grant warrant for his imprisonment.

When *Union Electric* was decided, a prior opinion could have rendered this a complete bar to an action for specific implement against a company. Sitting as a member of the House of Lords to hear the appeal of *Lochgelly Iron & Coal Co. v. North British Railway Co.* (1913),<sup>38</sup> Lord Kinnear had said that it was settled law that "a decree *ad factum praestandum* is enforceable by imprisonment, and in no other way, except ... where the thing which the defender is ordered to do may be done by somebody else at his expense", adding that "a decree against a railway company could not in any case be enforced by imprisonment...."<sup>39</sup> So, even if Holman had been a Scots company selling Union Electric a Raeburn painting, say, there is reason to think that Lord Kinnear's doubts in *Lochgelly Iron*, though not suffered by Lord Cowan in *Sutherland* forty-seven years before, would have caused a decree for implement to be rejected as unenforceable and vain. Further, Holman's English domicile raises the paradox that, as Gloag observed,<sup>40</sup> English courts shared none of Lord Kinnear's difficulties in ordering specific performance against companies or corporations. Why, then, did Lord Kinnear not interject in *Union Electric*<sup>41</sup> that it might be difficult to enforce the decree of specific implement, even had the defending company been Scottish? The respondent's counsel were not called<sup>42</sup> and, although the interlocutor sheet states that the Lords considered the appeal, record, and whole process,<sup>43</sup> *avizandum* was not made. Lords Kinnear, Johnston, and MacKenzie<sup>44</sup> agreed with Lord President Dunedin, renowned for his power of delivering judgment *ex tempore*. A sentence in the quoted passage<sup>9</sup>

And so the argument for the appellants really comes to this: it is incompetent because, being an Englishman, a Scotch Court could never do against him



what it never would do against a Scotsman

manifests the knotty vigour of speech rather than the smoothness of written reasoning. It is therefore not unlikely that a problem such as the enforceability of a decree *ad factum praestandum* issued against a company may not have darted into the recollection of a judge occupied with other pressing business in the interval of two months between *Lochgelly Iron* and *Union Electric*.<sup>45</sup>

By referring to "Scotsman",<sup>9</sup> however, Lord Dunedin meant his remarks on imprisonment to apply more widely than to companies and voluntary associations. On this more general level, his hypothetical facts differed from the actual facts of *Union Electric*, where both parties had appeared in court, even though counsel for one of them had not been heard. Yet the hypothetical facts themselves bore the potential to surprise Lord Dunedin with the actuality of the inconceivable. The pursuer concluding for implement, failing which, damages, sets out his claim in a summons.<sup>46</sup> Under section 22 of the Court of Session (Scotland) Act 1868,<sup>47</sup> in force at the time of *Union Electric*,<sup>48</sup> if the defender did not enter appearance on or before the second day after the summons was called in court, or lodge his defences within ten days after the call date, the cause could at once be enrolled for decree in absence. Under section 23 the Lord Ordinary, without the assistance of counsel, would have to grant decree in absence in common form in terms of the conclusions of the summons, and, subject to certain statutory conditions, this decree would have the same effect and limitations as the decrees in absence current at the promulgation of the Act. Dobie<sup>49</sup> stated that the court might exercise its discretion to refuse implement, even where implement was possible. It is submitted, though, that the general principle of Scots law requires the court to ordain implement in favour of a pursuer seeking it, unless good reasons for refusal exist,<sup>50</sup> and that the court's power of exercising its discretion to refuse implement for such reasons did not imply, as Lord Dunedin appears implicitly to have assumed,<sup>9</sup> that when the Lord Ordinary was considering an action for decree in absence under section 23, where the conclusions were for implement, failing which, damages, he invariably granted decree for damages rather than implement. If such a conclusion could result in a decree for damages only, then one could not speak of the court's power of exercising a discretion,<sup>51</sup> a choice between alternatives, for there would instead be a duty resting on it to award damages. Another consequence of the opinion would be that if a defender who had broken a contract feared the issue of a summons for implement, failing which, damages, he could evade the summons and hence the decree for implement by simply failing to enter appearance-- a dodge which, as regards a

conclusion *ad factum praestandum*, the majority of the Whole Court in *Aberdeen*<sup>52</sup> had negatived. Finally, the opinion would render idle the advice given by Maclaren<sup>53</sup> that, as undefended causes before the Lord Ordinary proceeded without explanation of the details, "where the summons concludes for a certain thing to be done by the defender, failing which the Court is asked to grant decree against him for a sum of money, it is necessary to enrol the cause in the Motion Roll to explain the particular decree required."

Section 23 of the 1868 Act allowed the defender within ten days of decree in absence passing, after paying the pursuer £2 2s., to enrol the cause in the Motion Roll and to have the decree in absence recalled and his defences received; but forbade him to reclaim against the decree in absence. Ten days after the decree in absence was pronounced, the pursuer could take the next step towards imprisoning the defender who refused to obtemper the decree: under section 23, he could extract the decree in absence. The *Juridical Styles*<sup>54</sup> described the procedure. The pursuer holding a decree *ad factum praestandum* could not imprison the contumacious debtor until the latter, having been charged to perform, had allowed the *induciae* of the charge to expire. Normally the pursuer would use the warrant annexed to the Court of Session's extract decrees, as set out in Schedule 1 of the Debtors (Scotland) Act 1838<sup>55</sup> and qualified by the Acts of Sederunt of 24 December, 1838, Schedule A, and of 8 June, 1881. The charge called upon the defender, under pain of imprisonment, to implement the obligations contained in the decree and extract, and would be executed by a messenger at arms or a sheriff officer to whom the pursuer's law agent would have notified the fulfilment required of the debtor. The officer would in due course return an execution of the charge in the form of Schedule 2 of the Debtors (Scotland) Act 1838. Once the *induciae* expired without the defender's having performed, the pursuer waited sixty days until section 24 of the Court of Session (Scotland) Act 1868 became applicable: where a decree upon which a charge was competent was pronounced in the absence of the defender after personal service of the summons on him, and the decree was not recalled under section 23, the decree after extract, and upon the lapse of sixty days after the expiry of a charge upon it not brought under review by suspension, was entitled to all the privileges of a decree *in foro* against the defender. Within a year and a day after the charge had expired, the pursuer might present it to the Keeper of the Register of Hornings, who registered it and then wrote upon the extract a dated and subscribed certificate of registration of execution of the charge. The pursuer wishing the imprisonment of his debtor for failure to obtemper a decree *ad factum praestandum* had

a Writer to the Signet indorse and subscribe on the extract a minute in the Bill Chamber for warrant to imprison, set out in the form of Schedule 4 of the Debtors (Scotland) Act 1838.<sup>56</sup>

*(Place and Date.)*

The charge being expired and registered as per execution and certificate produced, WARRANT IS CRAVED to search for, take and apprehend the person of the said A (*specify name of debtor or obligant*), and being so apprehended, to imprison him within a tolbooth or other warding place, therein to remain until he fulfil the said charge, and if necessary for that purpose, to open shut and lockfast places; and WARRANT also to magistrates and keepers of prisons to receive and detain the said A accordingly.

*(Signed) A B, W.S.*

*(In Sheriff Court)-- (Signed) A B.*

*(The Clerk will subjoin)-- Fiat ut petitur.*

*(Dated and signed by the Clerk.)*

If there was no cause to the contrary, the Lord Ordinary in the Bill Chamber then wrote *Fiat ut petitur* on the extract,<sup>56</sup> and the extract with this deliverance then became the warrant for imprisonment.

This demonstration of how a pursuer might secure the imprisonment of a contumacious debtor on a decree in absence at the time of *Union Electric* is borne out by the decision five years before *Union Electric* but not mentioned there: *Rudman v. Jay & Co.* (1908).<sup>57</sup> The headnote runs:

J. & Co. took decree in absence against R. for delivery of furniture obtained by him from them under a hire purchase agreement, the instalments due under the agreement not having been paid, and thereafter on 13th May 1907-- in the knowledge that the furniture had been sequestered for rent by R.'s landlord, and that decree of cessio had been pronounced against R.-- applied for and obtained a warrant upon which R. was imprisoned on 14th May 1907.

In an action by R. against J. & Co. for damages for wrongous imprisonment on the ground that J. & Co. at the date when they put the warrant in force knew that it was impossible for R. to give delivery of the furniture, *held* that, notwithstanding the sequestration and the cessio, the defenders were entitled to enforce the decree by imprisonment; and that the pursuer having been imprisoned under a warrant legally obtained and executed, the defenders, in the absence of the relevant averments of malice, were entitled to absolvitor.

True, decree for delivery in favour of a seller under a hire-purchase agreement, who remains owner of the goods until paid the full price, is distinguishable from decree for delivery in favour of a buyer if one takes the view that the buyer to whom the property has passed under the Sale of Goods Act is not the owner; but, as Lord Justice-Clerk Macdonald<sup>58</sup> and Lord Ardwall<sup>59</sup> both classified the decree in *Rudman* as *ad factum praestandum*, the distinction is immaterial when one comes to argue that Lord Dunedin's view of imprisonment in *Union Electric* was incorrect.

Since *Union Electric*, section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940<sup>60</sup> has changed the procedure for imprisonment on the ground of non-fulfilment of a decree *ad factum praestandum*. When the creditor applies for warrant to imprison, the court will grant warrant if satisfied that the defender is wilfully refusing to implement the decree. Dobie<sup>61</sup> said that the creditor must prove the debtor's wilfulness. It is submitted that non-fulfilment of the decree, failure to enter appearance to defend the application, and expiry of the *induciae* are circumstances combining to show wilful non-compliance. Under section 1(2), though, the court, instead of ordaining imprisonment, may recall the decree and ordain payment of a specified sum, or may ordain the court officers to search any premises in the defender's occupation, take possession of the corporeal moveables to which the decree of delivery relates, and hand them over to the pursuer if they find them. Section 1(2) has removed any doubt whether a decree for the delivery of a moveable may be ordained against a company; and has also swept aside the settled rule that the only compulsitor for such a decree is imprisonment.

### III. Comparisons with English and South African law on the nature of the claims involving specific performance and damages.

When English law is compared with Scots, it is significant that, extraordinary as specific relief may be in that system, the courts have not ventured to adopt Lord Dunedin's view<sup>62</sup> that a claim for specific performance, failing which, damages, is not really a claim for specific relief. Indeed, at law it was stressed that the aim of the *detinue* action was the recovery of the goods, and a sheriff could not execute immediately for damages.<sup>63</sup> In equity, too, the plaintiff may claim specific performance and, "further or alternatively," damages;<sup>64</sup> and, as Lord Wilberforce held in *Johnson v. Agnew*,<sup>65</sup> must elect between the remedies at the trial. He approvingly quoted O'Bryan J.'s words in the Australian case of *McKenna v. Richey*:<sup>66</sup>

The apparent inconsistency of a plaintiff suing for specific performance and for common law damages in the alternative arises from the fact that, in order to avoid circuitry of action, there is vested in the one court jurisdiction to grant either form of relief. The plaintiff, in effect, is saying: "I don't accept your repudiation of the contract and insist on your performing your part-- but if I cannot successfully insist upon your performing your part, I will accept the repudiation and ask for damages." Until the defender's repudiation is accepted the contract remains on foot, with all the possible consequences of that fact.

In South Africa the distinction between the forms of claim, "specific performance, failing which, damages," and "specific performance or, alternatively, damages", has been clearly made and some of the implications have been discussed.<sup>67</sup>

### **Specific performance, failing which, damages**

In *Custom Credit Corporation (Pty.) Ltd. v. Shembe*,<sup>68</sup> Van Winsen A.J.A. held that what Caney A.J. in *Ager v. Hitchcock*<sup>69</sup> had called "the double-barrelled relief" had been established by the Transvaal case of *Ras v. Simpson* (1904),<sup>70</sup> where the vendor successfully claimed payment of the price of 429 morgen of the farm "Elandsfontein" and, failing payment within the court-appointed time, cancellation of the sale and £100. This Transvaal practice<sup>71</sup> was adopted in the other provinces.<sup>72</sup> Judgment for specific performance can be followed by an action for cancellation and damages; the object of separate actions may be achieved by one order suitably alternative.<sup>73</sup> It is immaterial whether or not the property has been delivered;<sup>74</sup> and whether or not the different remedies are expressly reserved by the contract.<sup>75</sup> The order for specific performance need not be set aside before the second order, for cancellation and damages, is pursued;<sup>76</sup> and, on general principles of cancellation for major breach of contract, the right of cancellation derives not from the breach which led to the claim for specific performance, but from the defendant's further breach of contract in failing to obey the court's order for specific performance.<sup>77</sup> The judgment creditor cannot pursue the second order without having demanded fulfilment of the first;<sup>78</sup> the judgment debtor cannot offer to perform the second but refuse to fulfil the first.<sup>79</sup> Unless this result is clearly indicated by the wording of the order, non-fulfilment of the first part does not automatically lead to cancellation,<sup>80</sup> but does confer on the judgment creditor the right to exercise his option of enforcing specific performance or of going ahead with cancellation.<sup>81</sup>

The claim for damages is always a wise precaution not only against the court's

exercising its discretion to refuse an order of specific performance,<sup>82</sup> but also against the debtor's failing to obey such an order which has been granted against him.<sup>83</sup> The claim for damages may be allowed on amendment to the summons at the trial,<sup>84</sup> and must be proved and ascertained as strictly as any other fact in the case,<sup>85</sup> in the ordinary way.<sup>86</sup> Damages must not be punitively assessed<sup>87</sup> and may be awarded as "alternative relief."<sup>88</sup> As an exception to the rule that a plaintiff should have a cause of action when issuing summons,<sup>89</sup> he may claim damages which have not yet accrued.<sup>90</sup> "By allowing the adoption of the 'double-barrelled procedure' the Courts have sanctioned the institution of a claim based upon a cause of action which will only arise conditionally upon an event occurring subsequent to judgment, i.e., the defendant's failure to comply with the Court's first alternative order."<sup>90</sup>

### **Specific performance or, alternatively, damages**

On this form of claim, opinions diverge and the theory supporting it becomes complicated.

In the Transvaal, the directly alternative claim has been interpreted so that the choice between alternative remedies remains with the plaintiff. *Gibson v. Jones*<sup>91</sup> involved a summons which sought (a) an order that the defendant should transfer the erf and pay £100 damages; (b) or in the alternative, that he should pay £400 as damages and refund the price. The court (Innes C.J., Solomon and Mason JJ.) considered the general tenor of the summons to show that it was really for specific performance, damages to be awarded if the transfer was impossible or not ordered by the court. Therefore, as regards the question which party enjoyed the choice of remedies sought in the summons, Innes C.J. held for the plaintiff, whether the order was the "double-barrelled relief"<sup>92</sup> or was directly alternative.<sup>91</sup>

In Natal and the Eastern Cape, by contrast, the directly alternative order has been interpreted so as to leave the choice to the defendant. In *Payne v. Lokwe*,<sup>93</sup> despite some words hinting at the "double-barrelled relief",<sup>94</sup> Sheil J. held that Lokwe was not in contempt of court for having tendered £50 damages as the alternative to transferring the farm "Ferndale."<sup>95</sup> Likewise, in *Sunjeevi v. Wood*,<sup>96</sup> Bale C.J. held:<sup>97</sup> "I am anxious that I should not be understood as holding that the use of the words 'or in the alternative' were equivalent to the words 'which failing'." The clearest statement on the different forms of claim was made by Dove Wilson J. in his concurring judgment:<sup>98</sup>

I think there can be no doubt, according to our practice, that specific performance and a claim for damages on some such ground, for example, as delay, can be combined in the one action. There can also be no doubt that cancellation of a contract and damages can likewise be claimed in one action. It may often be, as here, that out of the same set of facts both these remedies, *i.e.*, one or other of them, may be open to a party to a contract, and where that is so I think there are three courses, one or other of which he may adopt. He may, if so advised, which I think ought seldom, if ever, to be the case, elect to claim from the other party one, and one only, of these remedies. Secondly, he may sue for one of the remedies, which failing, for the other, and I think in that case if he is successful he is entitled to the remedy principally sued for unless the defendant can shew that he is not in a position to give it, in which case the other relief sued for must be given. Thirdly, he may adopt the course of suing alternatively for one or other of the remedies, and if he does so, it means that he, being indifferent himself, gives the defendant the option which of the remedies he will give, and, if he is successful, the judgment against the defendant will be in the alternative form. This last course is the one which has been adopted by the plaintiff in the present action, and I think it is not only unexceptionable, but worthy of approbation in the view that it avoids multiplicity of action.

It is noteworthy that Dove Wilson J. had graduated M.A. at Aberdeen, LL.B. at Edinburgh, practised as advocate, acted as Sheriff-substitute in Edinburgh and Aberdeen, and helped produce the authorized reports of the Court of Session.<sup>99</sup> He became Judge President of Natal and an acting Judge of Appeal.<sup>100</sup> Reviewing P. Spiller's book, *A History of the District and Supreme Courts of Natal (1846-1910)*, Kahn has written:<sup>101</sup> "From 1902 until the arrival of Dove Wilson from Scotland in 1904, the bench was lamentably poor, being manned by permanent or acting appointees from the civil service. ... But Dove Wilson was excellent." In Scotland, Dove Wilson had compiled the fourth edition of his father's standard work, *The Practice of the Sheriff Courts of Scotland in Civil Causes*;<sup>102</sup> but, unfortunately for our present purposes, it does not discuss the forms of claim for specific implement and damages.

The passage from *Sunjeevi v. Wood* has been commented on by Mackeurtan.<sup>103</sup> After the word "option" he notes that, in Scotland, *McKellar* held the option to be the plaintiff's.<sup>104</sup> This was so, but we should add that the claim there was for "specific implement, failing which, damages";<sup>28</sup> so that *McKellar* allowed the pursuer a direct choice between remedies;<sup>36</sup> whereas the South African plaintiff claiming the "double-barrelled relief" must first demand specific performance before damages.<sup>105</sup> This distinction does not affect the above criticism of *Union Electric*.

The directly alternative claim has been disapproved in the Transvaal. Tindall J. thought that a claim leaving the choice of remedies to the defendant indicated "great confusion in the mind of the pleader."<sup>106</sup> Mackeurtan avers that such a claimant "is

making no election at all and on one set of facts is making mutually contradictory claims and ... may not do this: a defendant also may not, while relying on one set of facts only, put up mutually inconsistent defences."<sup>107</sup> D.J. Joubert, noting De Wet and Yeats's support for the directly alternative order as a help to the defendant in that it allows him another chance to perform the contract and so avoid cancellation,<sup>108</sup> tries to explain the theory of the order:<sup>109</sup>

If we are to consider the failure to comply with the principal order as a breach of contract entitling the plaintiff to cancel the agreement, then surely he and not the defendant may then elect to cancel the agreement. If we consider that the right to cancel the contract is derived from the original breach of the contract, then we have to explain why the plaintiff, who has chosen to enforce the agreement, does not lose his right to cancel the agreement. In addition we have to explain how a contract can be cancelled at the election of the defendant without the plaintiff's having cancelled it. Muller J. [in *Shembe*, 1972 (1) S.A. 174 (D) 175E-G, quoted by Joubert, 90 S.A.L.J. at 43 (1973)] has attempted to do this by saying that the plaintiff has made an election by which he is bound because he has given the defendant the choice of remedies. It would be unlikely that the plaintiff has appointed the defendant as his agent to cancel the agreement on his behalf. A more logical explanation is that the plaintiff has actually cancelled the agreement but has directed an offer to the defendant that if he performs the agreement (and pays, perhaps, certain other sums as damages) then he will be content to perform his side of the bargain, and accept the performance of the debtor. This offer is binding on the creditor and he cannot revoke it.

#### **Further comments on the "double-barrelled relief"**

Three aspects are worth discussing: the possible injustice to third parties; the assessment of damages; and the nature of the order for cancellation and damages.

##### **1. Possible injustice to third parties**

Possible injustice may be caused to the prospective cessionary of a judgment by the cedent creditor who holds an order of specific performance. This creditor may have decided not to enforce this order, since the judgment debtor has hitherto failed to obey it. The creditor may then turn to the second part of the order, cancel the contract and claim damages. An unsatisfied order for specific performance does not bar a later claim for cancellation and damages.<sup>76</sup> In *Evans v. Hart*,<sup>110</sup> Herbstein J. rejected the argument that the court should set aside the order for specific performance, so as to prevent a fraudulent plaintiff from ceding either that order or the one for cancellation and damages to some innocent third party who, unable to ascertain the truth, would suffer loss. Record of the payment of a judgment debt had never been required, neither had



record of an underhand agreement by the litigants to vary the terms of the agreement. The possibility of the judgment creditor's fraud had not elicited a rule that settlement or variation should be recorded against the judgment.

After *Evans*, *caveat cessionarius iudicamenti*. Very well: he examines the judgment document offered to him by the intending cedent, and notices from the judgment terms quoted on page 32 of *Evans*, for example, that, although the plaintiff claimed payment of the price (prayer (a)), an order compelling the signature of the transfer document (prayer (b)), payment of the transfer costs (prayer (c)), alternative relief (prayer (d)), and costs of the suit (prayer (e)), in the result judgment was given for prayers (a), (b), and (c); but not (d). The prospective cessionary is wise to ask the intending cedent whether an order for alternative relief, that is, for damages, has since been granted. If the answer is yes, the prospective cessionary knows that there is another order applying to the same facts, and that the order for specific performance is now useless because the intending cedent's decision to cancel the contract and claim damages has put an end to the judgment debtor's making specific performance. The idle offer of cession, therefore, is declined.

However, the intending cedent may fraudulently answer no, when in truth he holds an order for specific performance and another order for damages. The prospective cessionary inspects the judgment document offered to him, sees no damages order, so trusts it and the intending cedent. As a precaution, the prospective cessionary may ask the judgment debtor what orders applicable to the contract have been issued. These answers will normally be helpful, but they are not necessarily so, particularly if the judgment creditor has determined on deceiving a prospective cessionary and has therefore instructed the judgment debtor, perhaps with threats of harm to him or his family, what plausible fabrications he must corroborate. Where does the prospective cessionary obtain independent information about judgments relating to the contract?

Courts should strive to prevent the misuse of their judgments to trick the innocent, and should have the power to write upon the judgment documents the extent to which the judgment has since been affected by the litigants' conduct. Lord Hewart C.J.'s solemn words,<sup>111</sup> that justice should not only be done, but should manifestly and undoubtedly be seen to be done, ring hollow if they are interpreted as requiring judges to provide a grand spectacle in the court, but as absolving them from a continuing interest in the humdrum question whether their orders are misused afterwards. In *Evans*,<sup>112</sup> Herbstein J. doubted whether the court was empowered to register or record an underhand agreement whereby the litigants varied the judgment terms. He cited no

authority, but his doubts are justified by the rule that "a judgment, once given, is final and not subject to amendment or supplementation by the court which has delivered it. The judge is regarded as *functus officio*."<sup>113</sup> Writing on the judgment documents in the manner suggested falls outwith the recognized exceptions to this rule. How, then, achieve the recording of the subsequent history of the judgment? In *West Rand Estates Ltd. v. New Zealand Insurance Co. Ltd.*,<sup>114</sup> Kotzé J.A. held: "The jurists maintain that, where the court has made an error in his sentence, the proper mode of redressing or ratifying it is by way of an appeal to a higher tribunal. *Perez* (Ad Cod. 7.50, n. 4)." One would argue that what had begun as a correct order for specific performance had become incompatible with the damages order later pursued by the judgment creditor who had ended the contract to which the order of specific performance related. Even if such sophistry were accepted by the appeal court, the snag would remain that, as the history of the judgment would only be updated if there were an appeal, the prospective cessionary, before the conclusion of the cession, would stand as a stranger to the contract between the judgment debtor and creditor, so would lack the requisite *locus standi in iudicio* to raise an appeal. No class action sweeps to his aid. Once concluding the cession with the would-be cedent, he would have *locus standi*, a damages claim against the cedent who would vanish with the triumphant rogue's dispatch, and no right to specific performance by the judgment debtor.

Vigilant of his rights when weighing the merits of the proposed cession, he saves himself from the cedent's snare by asking the court registrar to check whether the judgment creditor has obtained a second, incompatible<sup>115</sup> judgment for alternative relief in relation to the same contract. Confirmation by the registrar is a warning not to proceed with the cession. So that the general ban on a court's amending or supplementing its judgments should not be infringed, and so that public awareness of the effect and history of the judgment may yet be increased, might it not be useful to suggest that, on the analogy of the Registries of Companies and of Deeds, an official such as the Registrar of Deeds should be statutorily empowered to record the original judgment and any variation of its terms by the parties concerned, the Supreme Court to have a controlling power of review over his conduct? The general ban would remain intact, because the judgment would not be altered by the court which delivered it; but its history would be recorded by an agency other than the court. To augment the importance of this register, the rule might be enacted that cessions of a judgment should be void unless the judgment and each cession be properly registered; a requirement which would help drive into the open the judgment debtor and creditor's underhand

agreement if the creditor were contemplating a cession. It is no convincing criticism of these proposals that they are unnecessary or misconceived in that the plaintiff who proceeds to cancellation and damages after adjudging specific performance an inadvisable course of execution is simply exercising his contractual right of cancellation for major breach. He must be enabled to exercise his contractual right<sup>116</sup>-- and prevented from misusing it so as to defraud other people.

## 2. The assessment of damages

Damages are to be proved and ascertained in the ordinary way.<sup>86</sup> The fundamental principle of damages for loss of bargain, for disappointed expectation,-- compensatory damages-- is that they are intended to place the aggrieved party, so far as money can do it, in the position he would have been in if the contract had been duly performed. This principle was authoritatively declared in South Africa by *Victoria Falls & Transvaal Power Co., Ltd. v. Consolidated Langlaagte Mines, Ltd.*<sup>117</sup> and in England by *Robinson v. Harman.*<sup>118</sup> An application<sup>119</sup> of this principle is the working rule that damages should be measured as the adverse difference between the contract price and the market value. Controversy arises over the question when must the market value of the thing sold be assessed: at the date of breach, or at the date of cancellation?

The most frequently reiterated view is that the assessment should occur as at the date of the performance, and so of the breach.<sup>120</sup> The reason for assessment as at this date has been well put by the Supreme Court of Canada:<sup>121</sup>

In cases dealing with the measure of damages for non-delivery of goods under contracts for sale, the application over the years of the above-mentioned principles<sup>122</sup> has given the law some certainty, and it is now accepted that damages will be recoverable in an amount representing what the purchaser would have had to pay for the goods in the market, less the contract price, at the time of the breach. This rule which was authoritatively stated in *Barrow v. Arnaud* (1846) 8 Q.B. 595, 115 E.R. 1000, may be seen as a combination of two principles. The first, as stated earlier, is the right of the plaintiff to recover all of his losses which are reasonably contemplated by the parties as liable to result from the breach. The second is the responsibility imposed on a party who has suffered from a breach of contract to take all reasonable steps to avoid losses flowing from the breach. This responsibility to mitigate was explained by Laskin, C.J.C., in *Red Deer College v. Michaels et al.* (1975), 57 D.L.R. (3d) 386 [at pages 390 to 391....]<sup>123</sup>

In South African law there is an alternative theory that assessment occurs as at the date of cancellation of the contract.<sup>124</sup> Sometimes the two theories conflict,<sup>125</sup> but, now that the market-price rule must be applied with greater flexibility,<sup>126</sup> perhaps the rule on mitigation of loss will be applied with less rigour and the second theory will be followed more often. This should happen when damages are claimed as the second barrel of the "double-barrelled relief."

The ordinary working rule that damages are assessed as at breach of contract was applied in *Bester v. Visser* (1957).<sup>127</sup> A sale of land on 15 September, 1955, required the defendant buyer to deliver a guarantee for the price within thirty days. On the defendant's failure to do so, the plaintiff sought an order for its delivery and an alternative order that, failing such delivery, the sale should be cancelled and £1,050 damages paid, reflecting the drop in market value of the land to £4,600 because of credit restrictions. Hiemstra J. held that the claim conformed with *Ras*.<sup>92</sup> Although the plaintiff had cited *Wessels*<sup>128</sup> and *Stewart v. Ryall*,<sup>129</sup> these could not help him, for the reduced value had to be taken as at the date of breach, not of claim. It would be odd if the damages sum should be subject to the unpredictabilities ("die onvoorspelbaarhede")<sup>130</sup> of a court roll. Had the case only appeared a year later and the property market declined further, the plaintiff's contention would have entitled him to a still larger sum.

It is submitted that Hiemstra J. should have assessed the plaintiff's damages as at the date of the trial. In the same division nine years earlier, the plaintiff in *Griessel v. Du Toit*<sup>131</sup> had claimed the balance of the price of immoveable property. There was a shortfall in the number of morgen contractually described, but not so serious as to justify cancellation by the buyer and the dismissal of the action by the court. The defendant went into possession on 1 January, 1947, and paid £750 towards the price on the 20th. On 17 July the plaintiff wrote to demand the balance and, when paid nothing, issued summons in August. Roper J. held him entitled to the balance (£2,230) against transfer, with interest as from the date of demand (17 July).<sup>132</sup> As to *quantum* of damages, Roper J. reviewed the conflicting valuations of the property and held:<sup>133</sup>

It is very difficult for me on this evidence to arrive at a precise figure as representing the present value of the property. ... In the circumstances it appears to me that the value lies between the two estimates, and I find that the present value of the property is £2,950.

The damages attributable to loss in market value, therefore, amount to £150. In addition the plaintiff is entitled to damages computed either upon the value of the occupation of which he has been deprived, or on the basis of interest upon the money unpaid. ... In all the circumstances I estimate the

plaintiff's damages under this head at £11 10s. per month.

Roper J. then ordered specific performance of the contract (payment of the price, with interest and costs) and added:<sup>134</sup>

Should the sum of £2,230 and the interest thereon not be paid within one month from the date of this order there will be an order for:

- (a) Cancellation of the contract and ejectment of the defendant from the property.
- (b) The sum of £150 as damages.
- (c) Further damages at the rate of £11 10s. per month from the 1st January, 1947, to the date when defendant is ejected from the property.

In the event of cancellation in accordance with this order the plaintiff will of course have to account for the £750 already received by him.

This decision is an interesting example of the calculation and issue of an order for the "double-barrelled relief" and is preferable to *Bester*.<sup>127</sup> Support for the date of trial as the proper time for assessing damages claimed in default of specific performance is also provided by Mackeurtan<sup>135</sup> and D.J. Joubert.<sup>136</sup> Mackeurtan adds that the time is not *litis contestatio* or set-down, but judgment.<sup>137</sup> He cites Paul<sup>138</sup> to the effect that all benefits which the buyer would have had from the thing sold must be considered, and with this citation we may compare *Wenham v. Ella*,<sup>139</sup> in which the High Court of Australia, though valuing the interest in Broadmeadow, N.S.W., as at the date of breach, also granted damages up to the date of judgment for loss of income from what the parties knew was an income-producing interest. Even stronger Roman authority comes from Pomponius:<sup>140</sup>

Si per venditorem vini mora fuerit, quo minus traderet, condemnari eum oportet, utro tempore pluris vinum fuerit, vel quo venit vel quo lis in condemnationem deducitur.....

where the *condemnatio* was the ruling by the *iudex* which ordered the defendant, in a dispute over a contract *bonae fidei*, such as sale,<sup>141</sup> to do for or give to the plaintiff whatever good faith required.<sup>142</sup>

Further cogent support for an assessment date later than breach where damages are claimed in default of specific performance is provided by the systems of the common law, in which equity surpassed law in justice and showed those systems working with

impressive suppleness.

The chief decision in England was delivered by the House of Lords in *Johnson v. Agnew*,<sup>143</sup> and a conspectus of the earlier cases, helpful as background, is provided by the Australians, Meagher, Gummow, and Lehane in their chapter on damages in equity.<sup>144</sup> In the nineteenth century, the common law courts having been empowered to order specific delivery of chattels,<sup>145</sup> the chancery courts, by section 2 of the Chancery Amendment Act 1858,<sup>146</sup> more memorably dubbed Lord Cairns' Act after its parliamentary sponsor, received statutory power to grant damages: the court with jurisdiction to award injunction or specific performance might, if it saw fit, award the injured party damages either in addition to or in substitution for the injunction or specific performance, and these damages might be assessed in such manner as the court might direct. This provision is preserved in England by section 50 of the Supreme Court Act 1981,<sup>147</sup> and, in Commonwealth systems, by a variety of similar legislation. Equitable damages are distinguishable from the common law damages which section 49 of the Supreme Court Act deals with, and a question significantly affecting their *quantum* is whether they are to be assessed as at the same time as damages at law.

In the nineteen seventies, many countries were beset by inflation.<sup>148</sup> In the English case of *Wroth v. Tyler*,<sup>149</sup> the price of the cottage contracted to be sold was £6,000; at breach, £7,500; at the date of the hearing, £11,500. Specific performance having been refused, damages assessed by the common law standard of breach would have been £1,500 and the buyers might never have acquired substitute property in a market of rising prices. Megarry J. held that equitable damages should be assessed at the date of judgment, as the true substitute for specific performance which the Act envisaged by speaking of the time when the court decided its award.<sup>150</sup> In *Fritz v. Hobson*,<sup>151</sup> Fry J. had assessed damages for breach of injunction at the date of the hearing; his decision had been approved by the Court of Appeal in *Chapman, Monsons & Co. v. Guardians of Auckland Union*.<sup>152</sup> The principle that damages should place the aggrieved party in the position he would have been in but for the breach of contract accorded with an assessment later than the breach date, for specific performance was "a continuing remedy, designed to secure (inter alia) that the purchaser receives in fact what is his in equity as soon as the contract is made, subject to the vendor's right to the money, and so on."<sup>153</sup> Equitable damages of £5,500 were awarded.

Megarry J.'s approach differed from Sholl J.'s in the Australian case of *Bosaid v. Andry*,<sup>154</sup> whereby both legal and equitable damages should be assessed "at the time when the contract goes or is deemed to be gone."<sup>155</sup> If the plaintiff pursued his election

of specific performance until refused it by the court, the contract was ended by the court and damages were to be assessed when the court delivered its refusal. Though perhaps leading to the same result, the approaches differed in that, according to Sholl J., the jurisdiction to award damages only arose on the termination of the contract, whereas, according to Megarry, J., the damages are a substitute for a continuing remedy based on an existing contract.<sup>156</sup>

*Wroth* has been followed in England, New Zealand, and Canada. In the English case of *Grant v. Dawkins*,<sup>157</sup> Goff J. applied it to damages, not in substitution for, but in addition to specific performance; though the situations are thought to be distinguishable.<sup>158</sup> Meagher, Gummow, and Lehane<sup>159</sup> consider that *Wroth* was applied in the New Zealand case of *Souster v. Epsom Plumbing Ltd.*;<sup>160</sup> but the report shows McMullin J. to have followed Sholl J.'s approach at least as much,<sup>161</sup> since he said that, "I find on my researches that the view taken by [Megarry J.] had already been taken by Scholl J. in *Bosaid*...."<sup>162</sup> Megarry J.'s approach, however, was certainly adopted in other New Zealand decisions. *Grocott v. Ayson*<sup>163</sup> concerned damages for the apprehended breach of a *quia timet* injunction; a state of affairs which Cooke J. regarded as even further removed than specific performance from the common law, in that no cause of action had yet arisen. *Mickey v. Bruhns*<sup>164</sup> qualified Megarry J.'s approach by applying the rule on mitigation. The plaintiff had delayed in claiming specific performance and, refusing that remedy, Quilliam J.<sup>165</sup> rejected the notion that the principles in *Robinson v. Harman*<sup>118</sup> and *Souster v. Epsom Plumbing Ltd.*<sup>160</sup> were intended to allow a dilatory plaintiff a profit from his delay because of the effects of inflation. So damages assessed on the *Souster* principle were then reduced by an amount reflecting the delay: the assessment date was moved back a year. *Wroth* was also applied in *Metropolitan Trust Co. of Canada et al. v. Pressure Concrete Services Ltd. et al.*<sup>166</sup> and *Calgary Hardwood & Veneer Ltd. et al. v. C.N.R. Co.*<sup>167</sup> In *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp. et al.*,<sup>168</sup> Estey J. noted *Mickey's*<sup>164</sup> consideration of the parties' conduct and cited *Kaunas v. Smyth et al.*,<sup>169</sup> which strikingly contrasted the two differing criteria for assessment dates: declining to follow *Wroth*,<sup>170</sup> Stark J. had instead applied the Canadian Supreme Court's decision in *Dobson v. Winton & Robbins Ltd.*<sup>171</sup> and held<sup>172</sup> that, where the plaintiff claimed specific performance and, in the alternative, damages at common law, then these should be assessed as at the date of breach or possibly the date when the plaintiff mitigated his loss with a substitute purchase.

The rule on mitigation was also applied to equitable damages in England. Back-

dating of the time for assessment was performed by the Court of Appeal in *Malhotra v. Choudhury*,<sup>173</sup> but critics<sup>174</sup> regard Cumming Bruce L.J.'s decision as marred by an inapposite analogy between specific performance and detinue,<sup>175</sup> and by a determination to treat the damages as equitable damages when, in fact, only legal damages had been claimed.<sup>176</sup> *Malhotra's* importance lies in its influence on Lord Wilberforce in *Johnson*,<sup>177</sup> who understood the Court of Appeal to have "expressly decided that, ... where damages are given in substitution for an order of specific performance, both equity and the common law would award damages on the same basis-- in that case as on the date of judgment." A decision free of such analogies and misdirections was *Radford v. De Froberville*,<sup>178</sup> where Oliver J. remarked that the older authorities "came from times of relative financial stability in which the date of assessment made relatively little, if any, difference and the passage of time could be adequately compensated for by an award of interest."<sup>179</sup>

Now we come to *Johnson v. Agnew*.<sup>180</sup> In November, 1973, the Johnsons (the respondents) contracted to sell Agnew (the appellant) property which the latter knew was mortgaged, the price to exceed the debts outstanding on the mortgages and a loan for buying other property. On 21 January, 1974, Agnew failed to complete the contract, and the Johnsons obtained summary judgment for specific performance, which was entered on 26 November. The Johnsons' mortgagees obtained possession orders, and Sheepcote Grange was sold on 20 June, 1975, and its grazing land on 3 April for less than the purchase price, so that the mortgages were not discharged. On 3 April, therefore, specific performance of the contract of sale became impossible. On 5 November, 1976, the Johnsons moved that Agnew be ordered to pay the balance of the price and that an inquiry into damages be made. Megarry V.-C. dismissed the motion. The Court of Appeal limited the claim to equitable damages, assessed as at 26 November, 1974. The House of Lords held that both legal and equitable damages were claimable, and assessed both kinds as at 3 April, 1975.

For our immediate purposes, there were two important questions: (1) did Lord Cairns' Act provide a measure of damages different from the common law; and (2) if not, how should the damages be assessed?<sup>181</sup>

Answering the first,<sup>182</sup> Lord Wilberforce held that section 2 of the Act governed procedure only, and equitable damages should not provide a measure different from legal damages. He preferred *Ferguson v. Wilson*,<sup>183</sup> *Rock Portland Cement Co. Ltd. v. Wilson*,<sup>184</sup> Fry,<sup>185</sup> and *Malhotra*<sup>173</sup> as authorities, rather than *Wroth*,<sup>149</sup> *Grant*,<sup>186</sup> and *Horsler v. Zorro*.<sup>187</sup>



To the second question Lord Wilberforce gave an answer worth quoting at length:<sup>188</sup>

The general principle of the assessment of damages is compensatory, i.e., that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to an assessment of damages as at the date of the breach-- a principle recognized and embodied in section 51 of the Sale of Goods Act 1893. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.<sup>189</sup>

In cases where a breach of a contract of sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost. Support for this approach is to be found in the cases. In *Ogle v. Earl Vane* (1867) L.R. 2 Q.B. 275; L.R. 3 Q.B. 272 the date was fixed by reference to the time when the innocent party, acting reasonably, went into the market; in *Hickman v. Haynes* (1875) L.R. 10 C.P. 598 at a reasonable time after the last request of the defendants (buyers) to withhold delivery. In *Radford v. De Froberville* [1977] 1 W.L.R. 1262, where the defendants had covenanted to build a wall, damages were held measurable as at the date of the hearing rather than at the date of the defendant's breach, unless the plaintiff ought reasonably to have mitigated the breach at an earlier date.

In the present case if it is accepted, as I would accept, that the vendors acted reasonably in pursuing the remedy of specific performance, the date on which that remedy became aborted (not by the vendors' default) should logically be fixed as the date on which damages should be assessed. Choice of this date would be in accordance both with common law principle, as indicated in the authorities I have mentioned, and with the wording of the Act "in substitution for ... specific performance." The date which emerges from this is April 3, 1975-- the first date on which mortgagees contracted to sell a portion of the property. I would vary the order of the Court of Appeal by substituting this date for that fixed by them-- viz. November 26, 1974.

Lord Wilberforce therefore confirmed (although in an *obiter dictum*<sup>190</sup>) the working rule for sale of goods, which applies unless two exceptions are present-- injustice to the aggrieved party if the working rule were applied; and the reasonableness of his deviation from the rule on mitigation. So in *Ogle* and *Hickman* the defendant sellers had successfully sought extra time to deliver the iron; and in *Radford* Oliver J. observed<sup>191</sup>

that "it is difficult to see how, assuming that it is reasonable for a plaintiff to seek specific performance, he can be under a duty to mitigate by acquiring equivalent property until he knows whether the court is going to give him his decree." That the working rule applies in the absence of the two exceptions was hinted at in *Johnson Matthey Bankers Ltd. v. State Trading Corporation of India*,<sup>192</sup> where damages for non-delivery of silver were assessed under the *prima facie* rule in section 51(3) of the Sale of Goods Act 1893. Acknowledging that *Johnson* expounded current law, Staughton J. warned:<sup>193</sup>

[I]t may be that in the absence of any such request [for extra time to perform], express or implied, one should hesitate long before concluding that the buyer has acted reasonably if the contract is for the sale of a commodity for which there is a readily available market.

Further, it is submitted that the requirement of reasonableness will help to block attempted evasions of the mitigation rule by dilatory plaintiffs<sup>194</sup> who, realizing that a naked claim for damages will attract its rigour, scheme to divert the court's attention from the damages claim by prefacing it with one for specific performance.

A query which does not seem to have been raised by counsel for the defence relates to the element of injustice. *Wroth, Grant, Souster, Mickey, Radford*, all from the late nineteen seventies, sought to prevent the injustice which would otherwise have resulted if inflation had been allowed to reduce the plaintiff's damages assessed as at the date of breach. Now that inflation in Britain a decade later is lower and exceeded by interest rates, might not the equitable basis of the cases from the nineteen seventies have disappeared, or at least require reconsideration?

It should also be noticed that *Johnson* does create difficulties of principle. Equity had surpassed law in providing damages assessed later than breach of contract, so clever plaintiffs would have spotted the advantage of claiming equitable damages. To head off the possibility of a different measure of damages suggested by Megarry J. in *Horsler*, Lord Wilberforce had to equalize the assessment rules for law and equity and thus soften the working rule at law. In so doing, he also created further problems of doctrine identified by Meagher, Gummow, and Lehane:<sup>195</sup>

The House of Lords in *Johnson* ... proceeded deeply to muddy the waters. It held (a) *Wroth v Tyler* was incorrect in holding that there was a difference between common law and equity as to the date on which damages should be assessed; (b) that *Wroth* ... was correct in ordering assessment of damages as at the date of judgment; (c) that damages at common law should be assessed

at the date of judgment; and (d) that damages should be assessed (presumably both at law and in equity) not at the date of breach but at the date "the contract is lost".

The case presents as many difficulties as it solves. In the first place, there is a mere assertion that Megarry J was wrong. No attempt is made to explain why. Yet surely it is accurate to say that his Lordship's judgment is "no more than a straightforward and ... obviously correct award of damages in equity" (Jolowicz in (1975) *CLJ* 233-4). In the second place, proposition (c) is hardly consistent with proposition (d). A plaintiff seeking common law damages for a breach of contract of sale consisting of a failure to deliver the property sold has presumably "lost" his contract before the institution of litigation, and should therefore have damages assessed at a date earlier than judgment. In this case, the two propositions yield entirely different results. Moreover, in equity, at least in those cases where the plaintiff persists until judgment in his request for specific performance, the contract is not "lost" until specific performance is denied him. This difficulty would then invalidate proposition (a).

To help explain why the conflict between propositions (c) and (d) arose, we may observe the similarity of wording between Lord Wilberforce's "date when the contract ... is lost" and Sholl J.'s "time when the contract goes or is deemed to be gone", and suggest that the conflict between the propositions reflects the possible differences between the approaches of Megarry J. (proposition (c)) and Sholl J. (proposition (d)) already mentioned. Lord Wilberforce did not refer to *Bosaid*, but it was cited to the House by the Johnsons' counsel<sup>196</sup> and disputed by Agnew's counsel;<sup>197</sup> and, even if we cannot prove from the report that Lord Wilberforce read it, the similarity of his expression to Sholl J.'s may allow the conclusion that, as *Radford* followed *Wroth*,<sup>198</sup> Lord Wilberforce confirmed by implication the approaches of both judges. This inference is not excluded by the disapproval which Lord Wilberforce expressed of Megarry J.'s opinions in *Wroth* and *Horsler*, for, in so far as not overruled, *Wroth* remains intact, confirmed by way of *Radford*.

To fight their way out of the doctrinal labyrinth outlined by the Australians is not a task which South Africans need set themselves, for their legal system does not distinguish between legal and equitable damages,<sup>199</sup> and *Johnson* and *Wroth* are persuasive but not binding authorities.<sup>200</sup> Instead, South Africans may look beyond the doctrinal complications and take a broader view of the decisions as convenient cross-references, aids in giving effect to Jansen J.A.'s warning<sup>201</sup> that the

market value, as a measure of damages, is, it is true, ordinarily related to the time and place of performance (with some slight latitude); but, so related, it is only a *prima facie* measure,<sup>202</sup> and merely an application of the basic rule

that the innocent party should be placed in the same position as that in which he would have been had no breach occurred (cf. *Hoffman and Carvalho v. Minister of Agriculture*, 1947 (2) S.A. 855 (T) at p. 871). It must yield, in appropriate circumstances, to other evidence of damage (cf. De Wet & Yeats, *Kontraktereg*, 3rd ed., pp. 165-6).

One such circumstance, it is suggested, is where the plaintiff claims specific performance, failing which, damages. Megarry J.'s opinion in *Wroth*<sup>153</sup> that specific performance is a continuing remedy fits well with Hefer J.A.'s statement in *Benson v. S.A. Mutual Life Assurance Society*<sup>203</sup> that "a plaintiff has the right to elect whether to demand performance or to sue for damages, and ... the Courts will *as far as possible* give effect to this election ... subject only to the qualification that the Court has a discretion to grant or refuse an order of performance." Adopting the summary of the English rules stated by *Halsbury*,<sup>204</sup> we may add comparative references to South African rules where appropriate to the "double-barrelled relief":

1. The general rule of assessment as at breach does not usually apply.<sup>205</sup>
2. The court has a discretion to choose the assessment date, but usually selects the point at which specific performance ceases to be available.
3. The plaintiff may launch an action for specific performance, but later abandon this. The date of abandonment is the assessment date: as Buckley L.J., following *Johnson*, held in *Domb v. Isoz*:<sup>206</sup> "the date at which damages should be assessed was yesterday's date, that being the day upon which the plaintiffs elected to pursue the remedy of damages in lieu of the remedy of specific performance, which down to that date they had pursued." The South African case which would be compatible with such an assessment date is *Celliers v. Papenfus and Rooth*.<sup>207</sup> Note that in *Domb* the action for specific performance was only abandoned after trial, on the second day of a three-day appeal,<sup>208</sup> so that the *Domb* principle of the abandonment date can apply before or after trial. *Celliers* may be similarly applied.
4. It is submitted that point 3 should be qualified by point 4, that the assessment occurs at the date when the seller can no longer transfer the property. This was so in *Johnson*<sup>209</sup> when the mortgagees contracted to sell the grazing land. It is thought that point 4 is itself subject to the proviso that the transferee of the property should be in good faith. If he is in bad faith, the rules on double sales apply:<sup>210</sup> the first buyer can have the second sale nullified and the property

transferred in accordance with the first sale-- and all the while the first buyer's damages claim against the seller will subsist.

5. Where the plaintiff pursues his remedy of specific performance as far as judgment, then the damages in lieu thereof are assessed as at judgment.<sup>211</sup>
6. The rule on mitigation applies.<sup>212</sup> In *Johnson* the date of the mortgagees' sale was also used as the cut-off point for fixing the Johnsons' right to interest on their damages.<sup>213</sup> Therefore, unless the second buyer in a double sale is *mala fide*, the first buyer should normally mitigate his loss as from the date when the goods are transferred to the second buyer and specific performance of the first sale thus becomes impossible. Mackeurtan<sup>214</sup> stated that where "the articles sold are unascertained goods, or, if specific, are such that the court would not decree specific performance in an action for their delivery, then these rules [on double sales] do not apply." This statement is now qualified by *Benson*,<sup>215</sup> where the respondent successfully claimed specific performance even though the shares were not specific and the sale sought to be enforced was therefore generic. Mackeurtan went on: "The purchaser who gets delivery will become the owner in the ordinary way, and the one who does not may sue the seller for damages, unless being the second purchaser he bought *mala fide*."<sup>216</sup> It is submitted that this second statement remains generally correct in relation to unascertained goods or goods the specific delivery of which used not to be ordered; but needs correction when the goods have not been transferred to either party, for there the maxim *qui prior est tempore potior est iure* should now apply in favour of the first buyer, unless the equities are against him;<sup>217</sup> and in addition, the first buyer is exempted from the rule on mitigation until the goods are transferred to a *bona fide* second buyer.

It is submitted that scope remains for applying the *Radford*<sup>218</sup> principle to prevent injustice resulting from a plaintiff's delay in suing for the specific performance to which *Benson* entitles him.<sup>219</sup> Of the judicial discretion to grant or refuse specific performance, Hefer J.A. said:<sup>220</sup>

It is aimed at preventing an injustice-- for cases do arise where justice demands that a plaintiff be denied his right to performance-- and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant.

In the circumstances which we are discussing, the court need not go so far as to refuse the plaintiff his remedy of specific performance; but would be entitled, for the sake of fairness to the defendant, to reduce the damages claimable in default thereof. The court may tell a plaintiff: "You shall have the order for specific performance which you seek; but, as you delayed in bringing your action, the damages which you claim in the event of the defender's failure to obey this court's order will be assessed as at the date when you should reasonably have begun your action for specific performance, failing which, damages."

Lastly, recalling that *Wroth* and similar decisions were attempts at doing justice for plaintiffs confronting the effects of inflation in the nineteen seventies, we may echo Oliver J.'s words in *Radford*<sup>221</sup> and say that, whereas *Bester v. Visser*<sup>127</sup> comes from the nineteen fifties, a period when prices in South Africa were relatively stable and the passage of time could be adequately compensated for by an award of interest,<sup>222</sup> now, in South Africa of the nineteen eighties, where the inflation rate exceeds interest rates, the judges should not hesitate to show the flexibility of their brethren in the common law;<sup>223</sup> otherwise the award of damages in lieu of performance, if assessed as at date of breach, will work injustice to the plaintiff and so flout the approach of *Novick*,<sup>201</sup> and, by implying that the plaintiff should have cancelled the contract soon after breach and mitigated his loss rather than pursued specific performance,<sup>224</sup> will render the wide and generous terms of *Benson* an effusion of judicial hot air.

### 3. The nature of the second part of the "double-barrelled relief"

In *Shembe*<sup>90</sup> it was held that the plaintiff was allowed to institute a claim based on a cause of action which would only arise conditionally upon an event occurring subsequent to judgment, the defendant's non-compliance with the court's first alternative order. Is the damages order therefore a judgment partly conditional; a judgment wholly conditional; or a mere forecast of damages to be assessed at a later date?

With *Shembe* we should compare two expositions of the rationale of the "double-barrelled relief." In *Ras*,<sup>225</sup> Innes C.J. held:

But the point arises, supposing Simpson does not pay the above amount, or any of it, what are the plaintiffs to do with the farm? Are they to hold it indefinitely at his disposal? In view of such a contingency they ask alternatively (should the balance not be paid within a time to be fixed by the Court) for an order cancelling the contract and directing Simpson to pay damages. I think this is the first case in which a claim of this nature has been made in the same summons, which prays for specific performance. But if

specific performance had been asked for and decreed, and had not been carried out, it would have been competent for the plaintiffs in another action to have asked, in lieu of that decree, for cancellation of the contract and damages. And if they could obtain that relief by means of a second action, I can see no reason in law why they should not ask alternatively for it in this action.

And in *Walter*,<sup>226</sup> Tindall J. held:

If a seller obtained judgment for the price and failed to obtain payment by execution, I can see no reason why he should not then be entitled to sue for cancellation and retransfer. ... If then, the rescission could be obtained by two actions, I do not see why it should not be obtained in one action by an order in the alternative in the form of the prayer in the present case.

Those arguing that the order for cancellation and damages is partly conditional will understand Innes C.J. and Tindall J. to have held that what could be achieved in two actions could be achieved in one action suitably framed, and will go on to say that actions in court must be answered by relevant judgments either granting or dismissing the terms averred and the relief sought by the action. The statement about damages, as the quotation from *Griessel*<sup>134</sup> shows, is part of the court's grant and thus an order in itself. But cancellation and loss-of-bargain damages are remedies which conflict with the remedy of specific performance.<sup>227</sup> Yet both conflicting elements are included in one judgment: and a description of that judgment would be incomplete if it mentioned the order for specific performance but omitted the one for cancellation and damages. Here a loose analogy with an area of quantum physics may help. In the nineteen twenties there arose<sup>228</sup>

the major problem facing the fledgling young quantum theory, consisting of a conflicting picture of the electron either as a particle or as a wave. Ever since Planck's discovery of a quantum of light, scientists had been puzzled about the indication of the corpuscular theories of light in its interaction with matter in contrast with the wave-like manner in which light spreads out in space. Similarly, in the structure of the atom, the electron-- according to Bohr's theory-- functioned as a particle and, according to Schrödinger, it functioned in a wave-like manner. Some of the behaviour of an electron within the atom could be explained on the basis of the movement of a particle in an orbit, but some had to be explained on the basis of stationary quanta of energy. This latter explanation required a conception of a discontinuous emission of energy that could only be traced and predicted on a probabilistic basis. Such a conception of discontinuity was directly in conflict with classical notions of physical causation depending on the continuity of phenomena in space and time.

The answer to this problem-- wave or particle?-- was the principle of complementarity, which was first<sup>229</sup>

publicly presented by Bohr at the International Congress of Physics in Como, Italy, in September 1927 [and which] states that two descriptions or sets of concepts, though mutually exclusive, are nevertheless both necessary for an exhaustive description of the situation. ... According to complementarity, the dual properties of wave and particle are both necessary, despite their mutual exclusiveness, for a complete description of light and electron behaviour.

The principle thus allowed for the simultaneous co-existence of antithetic concepts.<sup>230</sup> That the plaintiff's relief can be said to include the antithetic remedies of specific performance, on the one hand, and cancellation and loss-of-bargain damages on the other hand, two sets of remedies co-existing simultaneously, becomes possible by the introduction of the conditionality of the order for cancellation and loss-of-bargain damages. The conditions, as *Shembe* decided, is the defendant's failure to obey the order for specific performance. The condition is therefore suspensive.

According to Nienaber,<sup>231</sup> conditions can be attached to almost any kind of legal act, though the description of the way in which the condition operates is dependent on the type of legal act. Nienaber limits his article to conditions which appear in obligation-creating agreements.<sup>232</sup> Though we are discussing a condition attached to a court order, it is worth remembering that the source of that order is a contract which has been broken by one of the parties who agreed to its obligations; and that the judgment creditor's right to abandon the order for specific performance and cancel the contract and claim damages after the judgment debtor has failed to obey the first order has been justified on general principles of cancellation for major breach of contract.<sup>77</sup> With the necessary modifications, other contractual principles may also be applied to the court order for cancellation and loss-of-bargain damages. Nienaber avers that a suspensive condition does not postpone either the agreement or the *vinculum iuris* itself, but merely postpones the performance.<sup>232</sup> Where Van den Heever J. declared that the contract containing the suspensive condition "is binding immediately upon its conclusion; what may be suspended by a condition is the resultant obligation or its exigible content",<sup>233</sup> he was correct, in Nienaber's view,<sup>234</sup> when he said that it was not the whole contract which was suspended, but its exigibility; but he was incorrect when he said that the whole agreement was suspended. Nienaber<sup>234</sup> concedes that it would be otherwise if "obligation" here meant "duty to perform", for the postponement of the exigibility would thus be emphasized; but he doubts whether the word bore that meaning



in the context. His rebuttal of the view that a contract or agreement may be conditional assists, in turn, the view that the second part of the "double-barrelled relief" does exist once the first part is granted. The coming into being of a contract, says Nienaber,<sup>235</sup> is a fact, an event, which either does or does not happen. Nothing ever happens which is conditional. From this event flow certain consequences, namely, obligations. The conclusion of the contract is the spark which, as it were, activates the obligation, and it is these obligations which henceforth regulate the relations between the parties. Now the effect of the condition is precisely to qualify the operation of these obligations. In the same way, then, the court order for cancellation and damages failing specific performance is a fact, the consequences of which are that the debtor is henceforth liable for damages, though the exigibility of the order is deferred until the judgment creditor's cause of action arises once the debtor disobeys the first order.

Proponents of the second view, that the damages order is wholly conditional, and proponents of the third view, that the court's words are a mere forecast of damages, may criticize the first view as follows: the procedure of the "double-barrelled relief" allows the creditor two actions, but not two judgments, for the price of one. To answer the objection that actions in court result in judgments, for or against, it is submitted that the assessment of damages is expressed in the future tense, as is seen from *Griessel*.<sup>134</sup>

As to the "loose" analogy between court orders and concepts of nuclear physics, one recalls Ezra Pound's declaration: "You can *prove* nothing by analogy. The analogy is either range-finding or fumble."<sup>236</sup> Even if the one here is range-finding, it does not satisfy all eleven of Kaiser's points subsumed by the principle of complementarity,<sup>237</sup> so is imprecise. The complementarity principle itself has been disputed within nuclear physics by Einstein<sup>238</sup> and others;<sup>239</sup> and Bohr's analogical extensions of it to statistical thermodynamics, biology, psychology, cultural anthropology and sociology, justice and religion have, with the exception of the first extension, been controversial.<sup>240</sup>

Nienaber's views on the working of a suspensive condition may also be challenged. As he admitted,<sup>241</sup> there is authority<sup>242</sup> that such a condition suspends not just the exigibility of the obligation or *vinculum iuris*, but also the obligation or *vinculum iuris* itself.

The first two views conflict fundamentally over the nature, existence, and scope of a suspensive condition. The third view, which reduces the court's pronouncements on damages to forecast, seems opposed to the gist of the expositions by Innes C.J. and Tindall J.:<sup>225,226</sup> effective judgments expediently obtained. And forecasts cannot accurately be described as "relief" or "remedies".

The implications of the three views can be explored when we consider two disadvantages of suing for the "double-barrelled relief." One disadvantage involves the sedulously obdurate debtor; the other, a price fluctuation between the time when the damages order is issued subject to a condition (or mentioned in passing) and the time when the order is actually executed.

The sedulously obdurate debtor may resolve to disobey the order for specific performance and to thwart the one for cancellation and loss-of-bargain damages by disposing of his assets, with the intention of leaving insufficient material for a judicial sale in execution. If the court, as in *Griessel*,<sup>134</sup> appoints a date by which the order for specific performance shall be fulfilled, the debtor would seem to be given time to get on with spiriting away his assets. If the creditor is fortunate enough to learn of this ruse, may he ask the court to waive the period appointed for specific performance, on the ground that the debtor seems unlikely to obey the first order and resolved to forestall the second? If the second order is viewed as either wholly or partly conditional, the creditor may invoke the doctrine of fictional fulfilment of a condition;<sup>243</sup> but, as the second order, stripped of its condition, is incompatible with the first, he would probably be taken to have abandoned the first order in favour of the second. Certainly, the debtor here should not be heard to say that until the appointed date the creditor lacks a cause of action, and thus be allowed to hinder the execution of the second order by creating the unattractive prospect that the damages order will either have to be written off as a bad debt not worth pursuing, or will have to be enforced through all the costly tedium of bankrupting the debtor. The advantage of the doctrine of fictional fulfilment of a condition does not avail the third view, under which the court's observations on damages would lack binding force until the execution of the damages order.

The second disadvantage of the "double-barrelled relief" is that what the creditor gains by avoiding multiplicity of action, he may lose by rapid fluctuations of the market price. The trial court asked to grant the relief has to calculate damages as best it can before they become enforceable. The contention might be introduced that the contract remains on foot, the damages are in substitution for the continuing remedy of specific performance, and, just as the subject-matter of the contract may fluctuate in value, so the damages reflecting the loss of delivery of that subject-matter should be allowed to fluctuate accordingly. This contention is double-edged, of course, for, if the buyer as creditor, say, should be allowed to demand higher damages on a rising market, then, by equal reasoning, the seller as debtor should be allowed to pay lower damages on a falling market-- even to the point where he may no longer be liable for loss-of-bargain

damages at all, though remaining liable for supplementary damages because of his delay in performance. What obstructs this contention if the damages order is viewed as wholly or partly conditional and therefore already binding is the combination formed by two rules on damages: the rule that the plaintiff must state the amount of his damages, so that the defendant may have enough information with which to decide whether or not a settlement would be wise;<sup>244</sup> and the rule that the court must award damages once and for all, estimating future damages as accurately as it can from its available information.<sup>245</sup> This obstruction, however, might well be considered inapplicable to the damages viewed as judicial forecast: because it is in the nature of forecasts that they should be modified as fresh information about changes becomes available. So the same lack of binding force which prevents the creditor's outsmarting the sedulously obdurate debtor here allows the creditor the opportunity of speculating on the market trends before the damages order is executed.

#### IV The *dictum* that specific implement is confined to specific goods with a *pretium affectionis*

Lord President Dunedin's statement on the true specific implement has often been relied on as authority that the remedy is limited to specific goods bearing a *pretium affectionis*.<sup>246</sup> Gloag<sup>247</sup> said that Scots law probably required a *pretium affectionis*, some reason for demanding the particular article sold, rather than others of the same kind and value; but conceded that there was no actual decision to support this requirement, so regarded the remarks in his citations-- *Sutherland*,<sup>248</sup> *Davidson*,<sup>249</sup> *Union Electric*<sup>250</sup>-- as *obiter dicta*. Gow<sup>251</sup> went further by dismissing the *dictum* in *Union Electric* as not merely *obiter* but scarcely more than an aside.

The incidence of the words *pretium affectionis* is significant: we recall that with them Lord Chancellor Eldon described the scope of chancery jurisdiction over specific restitution of goods.<sup>252</sup> Lord President Dunedin in effect was narrowing Scots law into the confines of English equity; when, by contrast, the English attempts by various statutes had been directed at expanding the jurisdiction to match that of Scotland.<sup>253</sup> Although section 52 of the Sale of Goods Acts 1893 and 1979 has not significantly enlarged the English courts' jurisdiction to grant specific performance,<sup>254</sup> Scots courts do not have to follow this conservative and cautious trend; indeed, to do so would contravene subsection (4), which expressly does not diminish the Scots jurisdiction before 1894. Since that jurisdiction was marked out by *Linn v. Shields*,<sup>255</sup> no *dictum* such as *Union Electric's* can confine it, particularly when exposed as part of a false

distinction between a claim for true specific implement with no extra claim for damages, and a claim for "untrue" specific implement together with damages.<sup>256</sup>

We now summarize the main points of a discussion extended because of the misplaced importance assigned to *Union Electric*. Scots precedents before and after the case show that the nature of a claim and a decree *ad factum praestandum* is not altered simply by the inclusion of a claim for loss-of-bargain damages; and these precedents are supported by others from England and South Africa. The English and Scottish precedents are confirmed by the Sale of Goods Acts 1893 and 1979. In *Union Electric* the crucial question, who has the election of remedies, was answered incorrectly; and the rhetorical question about the inconceivability of imprisonment has been answered by a prior case and by the inconceivability of allowing deliberate absence from court to be raised from an evasion into a complete defence. The *dictum* that specific implement is confined to specific goods with a *pretium affectionis* stands alone in a discredited paragraph, an ahistorical observation unaccompanied even by a reference to those in *Sutherland* and *Davidson*. It ignores the *ratio decidendi* of *Linn v. Shields*, and what it does not mention it cannot overrule.

The problem in *Union Electric* concerned jurisdiction and reciprocal enforcement of judgments. Initially I thought that it was classifiable under the recognized exception of impossibility of performance. Professor Black rescued me by observing that the issue was not so much impossibility of performance as the difficulty of compelling performance by the foreign defender: a matter which troubles the pursuer and the court, therefore, rather than the defender. Two questions then arise: was the relation between the Inferior Courts Judgments Extension Act 1882 and the previous case law on enforcement of Scots judgments in England one of restriction, confirmation, or extension? And ought Scots judges to worry whether or not their decrees may prove unenforceable in courts outwith Scotland; or may such an outcome be left to the pursuer to resolve and avoid as best he may? The answers touch *Union Electric* and the next Scots case to be discussed, *Aurdal v. Estrella*.<sup>257</sup>

Answers to these questions, owing to the element of a foreign defender, lie where the sets of contractual remedies and of international private law (conflict of laws) intersect. A Scots court deciding the matter would inevitably ponder what chance its decree of specific implement would have of enforcement by the courts of the foreign defender's domicile. Those courts, if using the Anglo-American system of international private law, would start from the basic principle for enforcing foreign judgments: the courts of a foreign territory do not, in the absence of international agreement, allow

direct operation to judgments given by the courts of other sovereign territories.<sup>258</sup> Are England and Scotland sovereign territories for the purpose of this principle of international private law? Authorities in both nations<sup>259</sup> show that until the nineteenth century, despite Jessel M.R.'s indulgent opinion,<sup>260</sup> they are foreign territories when judgment creditors seek to enforce decrees by one territory's courts in those of the other. It is thought that this consequence derives from the terms of the Act of Union 1706:<sup>261</sup> Article XVIII preserved Scots law, as subsequently variable by Act of the joint Parliament; and Article XIX prevented the Chancery, Queen's Bench, Common Pleas, or any other court in Westminster Hall from hearing Scots causes, a rule since varied, most importantly, by the extension of the House of Lords' competency to the hearing of civil appeals from Scotland.<sup>262</sup>

Direct operation is thus denied to the judgment; but the interests of justice demand that indirect operation be given by the domestic court's permitting the foreign judgment creditor a right of appropriate action. Such permission was rationalized formerly by the doctrine of the comity of nations, but from 1842 has been located in the "doctrine of obligation,"<sup>263</sup> itself part of the vested-rights explanation of the enforcement of foreign law.<sup>264</sup> The *ratio decidendi* of *Russell v. Smyth* (1842),<sup>265</sup> an action for *assumpsit* to recover money awarded by the Court of Session in a Scots divorce, was applied in *Williams v. Jones*<sup>266</sup> and *Godard v. Grey*,<sup>267</sup> and summarized by Blackburn J. in *Schibsy v. Westerholz*<sup>268</sup> as follows: "[T]he judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts in this country are bound to enforce."

Blackburn J. referred to a "sum" and therefore to a money judgment. The English rule on enforcement of foreign judgments *in personam* at common law is succinctly expressed by Morris:<sup>269</sup>

A foreign judgment *in personam*, given by a court having jurisdiction according to English rules of the conflict of laws, may be enforced by action in England, provided (a) it is for a debt, or a definite sum of money, (b) it is not a judgment for taxes or penalties, and (c) it is "final and conclusive."

The judgment must be for a debt, or definite<sup>270</sup> sum of money (including damages and costs<sup>271</sup>) and not, e.g. a judgment ordering the defendant specifically to perform a contract.<sup>272</sup>

Wolff<sup>273</sup> states that a "foreign decree ordering the defendant specifically to perform a

contract or to restore a chattel to its owner cannot be enforced in England." This exclusion of foreign decrees for specific performance is affirmed by Dicey and Morris<sup>274</sup> and by Cheshire and North,<sup>275</sup> the latter deriving it from Brett M.R.'s pronouncement that "the liability of the defendant arises upon an implied promise to pay the amount of the foreign judgment."<sup>276</sup> Why should enforcement of foreign judgments be confined to those for a definite money sum? The forms of action clank their chains.<sup>277</sup> The action of debt, as Holdsworth explained,<sup>278</sup> was the appropriate means of enforcing foreign judgments, and its successor, *indebitatus assumpsit*, lay for an ascertained sum only. So the answer to our first question is that the Judgment Extension Acts of 1868<sup>279</sup> and 1882<sup>280</sup> neither restricted nor extended but confirmed the prior case law: section 3 of the 1868 Act spoke of decrees for payment of "debt, damages, or expenses" as registrable and enforceable, and Lord President Inglis held that it excluded "all judgments by Courts of Equity in England or Ireland, and all judgments or decrees *ad facta praestanda*, or of the nature of prohibitions or injunctions-- in short, ... only a money decree ... can be enforced under this statute."<sup>281</sup>

Union Electric would have therefore had to prove its claim afresh in persuading an English court to grant specific performance. As the Exello carbons seem not to have been specific, particularly valuable, or unique, the suit would have been dismissed in England. Perhaps to facilitate the obtaining of damages, therefore, the Sheriff of Lanarkshire suggested that Union Electric should limit its claim to damages, and, with the same intention to assist, Lord Present Dunedin reinterpreted the claim for "specific implement, failing which, damages" as "specific implement or damages at the defender's option." It is possible that if asked straight after the decision, "Did you intend this reinterpretation to apply automatically within Scotland, even where the defender is not foreign," the Lord President might have retorted, "Of course not: we were just trying to keep Union Electric's claim alive, as we felt some difficulty in ordaining a decree of specific implement which would not be enforced in England." This difficulty no longer exists: section 18 and Schedule 7 of the Civil Jurisdiction and Judgments Act 1982 render Scots decrees for specific implement enforceable in England by registration in the High Court. Today Lord President Dunedin's distinction between true specific implement with no extra claim for damages and "untrue" specific implement together with damages belongs to the history of the Judgment Extension Acts 1868 and 1882: by retaining it when the need to do so has passed, Scots lawyers in effect allow their notions of the competence of specific implement in actions between Scots litigants to be ruled by the forms of action, buried across the Tweed in England.<sup>282</sup>

General affirmation of the common law rule limited to money judgments is clear.<sup>283</sup> Yet, perhaps by combining an ignorance of the higher mysteries of English equity with the eccentricity diagnosed as afflicting scholars of international private law,<sup>284</sup> I am driven to remark that the suitability of a foreign court's chancery decree (or decree in a field that in England would fall within cancellarial purview) to justify an action at law in England, according as the foreign judgment fits into the strait-jacket of the forms of action, is not the point: why can a foreign equity decree not be rendered enforceable in English equity courts?<sup>285</sup> Foreign equity decrees were enforceable by action in the courts of law— provided the subject was money.<sup>286</sup> To the objection that the courts of law lacked procedure to enforce and superintend foreign equity decrees not sounding for a money sum, the answer is that jurisdiction over the enforcement of those decrees should never have been arrogated by the courts of law in the first place, but should have been left to equity courts, which did have appropriate procedure. One hardly submits the "Emperor Concerto" to a room of Grade-Four pianists adept at a trite ditty and leaves them to determine that the music is unplayable throughout England; one finds a concert pianist. Although the chancery courts were originally not courts of record in the archives of which a recitation of the terms of the foreign judgment might be sought,<sup>287</sup> after the Supreme Court of Judicature Act 1873,<sup>288</sup> when by section 23 every division of the High Court was authorized to grant legal and equitable remedies, this deficiency has been supplemented. The equitable enforcement of foreign equity decrees would not oust the common law, but would serve equity's traditional function of supplying what the law may lack, for the doing of more perfect justice between parties. As Lord Denman C.J. observed in *Henderson v. Henderson*, "The decrees of foreign Courts of Equity may indeed, in some instances, be enforceable no where but in Courts of Equity, because they involve collateral and provisional matters to which a Court of Law can give no effect...."<sup>289</sup> To show that the matter retains practical significance, suppose that two Englishmen seconded on business to a company in South Africa contract for the sale of a Constable painting in England, delivery is not made, and a South African court grants the buyer specific performance. As South African judgments are not covered by the Judgments Extension Act 1868, the Inferior Courts Judgments Extension Act 1882, the Administration of Justice Act 1920,<sup>290</sup> the Foreign Judgments (Reciprocal Enforcement) Act 1933,<sup>291</sup> or the Civil Jurisdiction and Judgments Act 1982,<sup>292</sup> the nineteenth-century precedents apply,<sup>293</sup> the High Court in England cannot at law allow the enforcement of a foreign order for specific performance, and the judgment creditor must, it seems, endure all the costly boredom of establishing the

justice of his claim before another string of courts in England.

As the enforceability of Scots decrees outwith Scotland has been considerably increased by statutes unknown at the time of *Union Electric* and *Aurdal*, judges today might give an answer different from those in cases dating from the early years of this century. Besides *Union Electric* and *Aurdal* no case has apparently required judges to consider how far their decree for specific implement may be enforceable abroad.

This topic is well handled by the Australian, Spry,<sup>294</sup> in a review of the English approach which might attract support from Scottish courts. Equitable jurisdiction is determined by three main factors:<sup>295</sup> equity's operation *in personam* against the defendant, effectiveness, and comity. The judge examines the content of the rights in question and the manner of their enforcement.<sup>295</sup> Title to land raises special problems discussed in relation to *Aurdal*.<sup>296</sup> Otherwise, the mere absence of the defendant or the property overseas does not bar the court's granting equitable remedies: in such instances a distinction should be retained between power to intercede and discretion to intercede.<sup>297</sup>

The basis of equitable jurisdiction was found in the defendant's physical presence within the court's power when proceedings were served, and the court, by the writ *ne exeat regno*,<sup>298</sup> could prevent his departure.<sup>299</sup> Later, his submission to the court's jurisdiction<sup>300</sup> and his susceptibility to effective service of process by way of statutory procedures and rules of court<sup>301</sup> expanded equitable jurisdiction over him.

Today the absence of the defendant or the goods abroad still affects the court's discretion whether to grant or refuse the equitable relief sought.<sup>302</sup> The court may decline jurisdiction on the ground of *forum non conveniens*.<sup>303</sup> Or it may refuse a remedy which would be difficult to enforce or, if granted, would require the defendant to break the law of the place of performance or to do there what is impossible. In such instances, the probable injustice and unreasonableness of the decree, if it were granted, compels its refusal.<sup>304</sup> The court also weighs "the degree of probability with which it appears that the proposed order will be obeyed by the person to whom it is directed."<sup>305</sup> Spry's analysis merits extensive quotation:<sup>306</sup>

Courts of equity have a discretion to refuse equitable relief on the ground of futility if it appears to them that the probability of compliance with the material order is so small that the making of an order is not justified in all the circumstances. If at the time of making an order the defendant is within the jurisdiction, or is expected to return, or has substantial assets there that might if necessary be sequestrated,<sup>307</sup> no special difficulty arises. In other



situations there has appeared from time to time a tendency to refuse relief, on the ground that the intervention of the court would be futile; and it has been said that if foreigners "were out of the jurisdiction, and a decree was made, the court would have not power to enforce it, and it was a great principle of courts of equity never to make decrees they could not enforce."<sup>308</sup> A contrary view has also been put forward, "It is not the habit of this court in considering whether or not it will make an order to contemplate the possibility that it will not be obeyed."<sup>309</sup> But support can be found for a third view, which is preferable as a matter of equitable principle, that the precise probability that the particular order in question will be obeyed will have more or less weight according to the other circumstances and that it will be taken by a court of equity into account in exercising its discretion, together with such other matters as the degree of injury or inconvenience that will be suffered by the plaintiff if he does not obtain relief.<sup>310</sup>

Spry finds support for the third view in *Cammell v. Cammell* and, as to proceedings *in rem*, *The Conoco Britannia*.<sup>310</sup> The latter takes matters no further for specific performance. Brandon J. held<sup>311</sup> that it was arguable, though he would not say it was right, that a plaintiff could not enforce an order of specific performance or of injunction against a defendant who had not appeared. The law would need close examination when these topics did arise for argument and discussion, particularly with regard to the traditional form of judgment in Admiralty actions *in rem* before the High Court, the relevance and applicability of the Supreme Court Rules about the form of money judgments, and the underlying reasoning of *The Dictator*<sup>312</sup> and *The Gemma*.<sup>313</sup> Perhaps reference to some provisions of the Supreme Court of Judicature (Consolidation) Act 1925<sup>314</sup> and the Administration of Justice Act 1956<sup>315</sup> would show as unjustified the distinctions made between what can be done when the defendant appears and what can be done when he is absent. Such a list of points for courts to decide some other time displays caution and an exiguity of practical guidance.

More helpful is Scarman J.'s approach in *Cammell*. A husband appealed against an interim order for maintenance awarded under section 26 of the Matrimonial Causes Act 1950,<sup>316</sup> objecting chiefly that the Probate, Divorce and Admiralty Division either lacked jurisdiction or should decline jurisdiction to award a maintenance order. The parties married in England in 1954 and had a child in 1959. The husband deserted soon afterwards to France and lived as an artist dependent on the charity of friends and patrons. Having left his wife their home, he owned no valuable assets in England. He had sought to annul the marriage in the French courts, which rejected English courts' jurisdiction to dissolve the marriage or to award a maintenance order against him and

would have to decide the validity of the marriage before awarding maintenance to his wife or child. Scarman J. disagreed with the husband's counsel that any English order for maintenance would be wholly ineffectual.<sup>317</sup> The judge considered not only the principle of international private law instanced by *Tallack v. Tallack and Brockema*<sup>318</sup> and *Wyller v. Lyons*,<sup>319</sup> but also the legal policy that in disputes over the custody or maintenance of an infant, the child's welfare was paramount.<sup>320</sup> The issue was discretion.<sup>321</sup> The Probate Division might decline to make an order that would seem to prove wholly ineffectual or would infringe a foreign court's authority. The French courts being powerless to act, however, the Probate Division should intervene. Its order would not necessarily be quite vain: the husband would very probably attend the English hearing and then be liable to the enforcement *in personam* of the court's decree. *Tallack*, concerning foreign land, was factually distinguishable from *Cammell*, where an order that a French resident should maintain his child in England would not infringe French sovereignty. *Hunter v. Hunter and Waddington*<sup>322</sup> showed that enforceability of the order within the territorial jurisdiction did not encroach on the jurisdiction of the foreign domiciliary's courts. Scarman J. felt no need to decline jurisdiction. And, even if for the time being the order had only moral force, it was right that the father's obligation to maintain his child should receive public recognition in the courts of the child's home and enjoy immediate enforceability.

Only in the anguished discourse of Jonathan Swift's satire, *A Modest Proposal*, would an order for the specific performance of a sale of goods be entirely compatible with an order for the maintenance of a child. Yet a judicial order that a contracting party should do what he had bound himself to do preserves in more subdued form the moral suasion that people should keep their promises. It is at least arguable that in *Union Electric* the First Division would have been right to ordain a decree of specific implement which, even though possessing for the time being only moral force, would have publicly affirmed Holman's continuing obligation to perform and would have been immediately enforceable, so that as a foreign company planning future business in Scotland Holman would speedily have known that it would first have to discharge its prior responsibilities to the pursuer or face the diligence of the court. One probably unforeseen implication of *Union Electric* is the suggestion that, to evade an impending decree of specific implement, a Scots company need simply relocate to a country where the decree is not in terms enforceable, wait the minimum period which delicacy requires, and then re-enter the Scottish economy with pristine creditworthiness and unblemished mercantile respectability.<sup>323</sup> For this reason alone, Scarman J.'s positive

approach in *Cammell*, predicated on the likely return of the defendant into the court's territorial jurisdiction, is preferable to the shrinking negativism of *Polack v. Schumacher*.<sup>324</sup> It inclines to the approach taken by the Court of Appeal when deciding *In re Liddell's Settlement Trusts*, cited with approval by the House of Lords so recently as 1981 in *Castanho v. Brown & Root (U.K.) Ltd.* by Lord Scarman.<sup>325</sup> The lord of appeal there<sup>326</sup> quoted Slesser L.J.'s remark in *Liddell*<sup>327</sup> that the absent defendant's inevitable disobedience of the court's order should not be assumed. So, when there are nervous twitterings from counsel that a decree for specific implement against a foreign defender may turn out to be a *brutum fulmen*, Scottish courts might pause to reflect that the valid, enforceable decree would exile or exclude the defender from the Scots economy until his contumacy had been purged-- not so very *brutum* after all. The answer to the second question, therefore, is that unless the ground of *forum non conveniens* can be established, or the probable effect of the Scots decree overseas can be reliably predicted as unjust or unfair,<sup>328</sup> a Scots court in a matter not involving title to foreign land or similar questions<sup>329</sup> should grant a decree of specific implement to the pursuer who desires it, even if the exact date of the foreign defender's return to the territorial jurisdiction seems rather uncertain.

#### Notes

1. *Union Electric Co. Ltd. v. Holman & Co.* 1913 S.C. 954 (1st Div.).
2. *Id.*, at 955.
3. *Inferior Courts Judgments Extension Act* 1882 (45 & 46 Vict. c. 31).
4. 1913 S.C., 956.
5. *Id.*, 957.
6. *Morley*, 1888, 16 R. 78 (1st Div.).
7. 1913 S.C., 957.
8. *Stewart*, 17 R. (H.L.) 1, 5 *per* Ld. Herschell.
9. 1913 S.C., 958.
10. *Cf.* the Natal case, *Sunjeevi v. Wood* (1909) 30 N.L.R. 76, 81. *See* my pp. 263-4 and note 98.
11. *Seaforth's Trs.*, 1844, 7 D. 180 (1st Div.).
12. *Id.*, 181.
13. *Id.*, 182. *Seaforth's Trs.* was followed in *Millat v. Marshall*, 1878, Guthrie's Select Sheriff Court Cases (2d series) 226.
14. *Dickson*, 1889, 16 R. 673 (1st Div.).
15. *Id.*, 674.

16. *Stewart*, 17 R. (H.L.) 1.
17. *Kennedy v. Stewart*, 1889, 16 R. 421, 424 (1st Div.).
18. 17 R. (H.L.) 1, 11. *See*, also, *Dixon v. Bovill*: the pursuer claimed specific delivery of the iron, failing which, damages; and was upheld by the House of Lords: *supra* 207-8.
19. 1904, 20 Sheriff Court Reports 225.
20. *Id.*, 226.
21. *Aberdeen*, 1872, 10 M. 971.
22. *Middleton*, 1892, 19 R. 801 (1st Div.).
23. *Supra* chapter 10, pp. 223-4.
24. 10 M., 873.
25. *Shotts Iron Co.*, *supra* chapter 10, p. 223.
26. *Linn*, chapter 11, pp. 237-9.
27. 1928 S.C. 50 (2d Div.).
28. *Id.*, 505, 507, 518.
29. *Id.*, 509-10.
30. *Juridical Styles: JURIDICAL SOCIETY, A COMPLETE SYSTEM OF CONVEYANCING*, Vol. III: Forms of Process in the Supreme Courts of Scotland. 18 (3d ed., 1888).
31. 1881, 9 R. 337 (1st Div.).
32. 1892, 19 R. 801 (1st Div.).
33. 1928 S.C., 518.
34. *Id.*, 523.
35. 1928 S.C., 522.
36. 1928 S.C., 523-4.
37. *Id.*, 520.
38. *Lochgelly*, 1913 1 S.L.T. (H.L.) 405.
39. *Id.*, 414.
40. GLOAG, *CONTRACT* 659 and n. 4, citing *FRY, SPECIFIC PERFORMANCE* 56 (6th ed., 1921).
41. 1913 S.C., 959.
42. *Id.*, 956.
43. *Avizandum* is not reported as having been made: 1913 S.C., 956. The interlocutor sheet, signed by Lord Dunedin, records the background to the 1st Division's decree thus: "Edinburgh 14th May 1913 The Lords appoint the cause to be put to the Summar Roll. ... Edinburgh 5 June 1913 The Lords having considered the Appeal, Record and whole process, and heard Counsel for the Appellants, Dismiss the Appeal....": C.S. 251/459 of 1914.
44. 1913 S.C., 959.
45. *Lochgelly*, 1913 1 S.L.T. 405 (1st April); *Union Electric*, 1913 S.C. 944 (5 June).
46. MACLAREN, *COURT OF SESSION PRACTICE* 296; W.J. DOBIE, *SHERIFF COURT STYLES* 188-91 (1951); *SHERIFF COURT PRACTICE* 496-8 (1952).
47. (31 & 32 Vic. c. 100).

48. Apart from ss. 2, 91, most of the 1868 Act's provisions are now of little practical importance and are superseded by the Rules of Court 1965: PARLIAMENT HOUSE BOOK B19 n. 1.
49. DOBIE, SHERIFF COURT PRACTICE 496.
50. *Stewart*, 17 R. (H.L.) 1, 10-1; *Mackay v. Campbell* 1966 S.C. 237; 1967 S.C. (H.L.) 53.
51. *Moore v. Paterson*, 9 R. 337, 351; *Stewart*, 1, 10-1; *Aurdal v. Estrella* 1916 S.C. 882; *Salaried Staff London Loan Co. Ltd. v. Swears and Wells Ltd.* 1985 S.L.T. 326.
52. *Supra* 254.
53. MACLAREN, COURT OF SESSION PRACTICE 352.
54. *Juridical Styles*, *supra* n. 30, 329 *et seq.*
55. (1 & 2 Vict. c. 114).
56. In the Sheriff Court, the Minute for Warrant to Imprison followed Debtors (Sc.) Act 1838, Sched. 8; *Juridical Styles*, *supra* n. 30, 340.
57. 1908 S.C. 552 (2d Div.).
58. *Id.*, 558.
59. *Id.*, 558-9.
60. (3 & 4 Geo. 6 c. 42).
61. DOBIE, SHERIFF COURT PRACTICE 284.
62. *Supra* 180.
63. *See Malhotra v. Choudhury* [1980] Ch. 52, 79 (C.A.).
64. *Johnson v. Agnew* [1980] A.C. 367, 392G; Supreme Court Act 1981 (c. 54), ss. 49, 50; Sale of Goods Act 1979, s. 52(3); SPRY, EQUITABLE REMEDIES 595, 612; JONES & GOODHART, SPECIFIC PERFORMANCE 222; TREITEL, CONTRACT 805 and n. 18.
65. [1980] A.C., 392G.
66. [1950] V.R. 360, 372; quoted at [1980] A.C., 397D-F.
67. I have relied on the detailed discussion by D.J. Joubert, 90 S.A.L.J. 37 (1973).
68. 1972 (3) S.A. 462 (A) 470F.
69. *Ager v. Hitchcock* 1950 (3) S.A. 372 (D) 375; *Sarann Furnishers Ltd. v. Brink N.O.* 1966 (3) S.A. 48 (N) 51A.
70. 1904 T.S. 254.
71. *Dennill v. Atkins & Co.* 1905 T.S. 282, 287.
72. Joubert, 90 S.A.L.J., 40 and nn. 22, 24.
73. *Walters v. Andre* 1934 T.P.D. 341, 343.
74. *Ras* (not delivered); *Walters* (delivered).
75. *Shembe*, 1972 (3) S.A. at 471A-B.
76. *Evans v. Hart* 1949 (4) S.A. 30 (C); *Lieman v. Kieswetter*, *id.*, 38 (C) 40; *Papenfus v. Luiken* 1950 (2) S.A. 508 (0).
77. *Nieuwoudt N.O. v. Els* 1953 (3) S.A. 642 (0) 644-6; *Gordon v. Moffett* 1934 E.D.L. 154; *Walters*, 1934 T.P.D. at 343; *Shembe*, 1972 (3) S.A. at 471A; Joubert, 90 S.A.L.J. at 41.

78. *Cornforth v. Dalton & Roux* (1922) 43 N.L.R. 116, 121, 123-4.
79. *Sunjeevi v. Wood* (1909) 30 N.L.R. 76, 81; *Estel v. Novazi* (1919) 40 N.L.R. 406; *Steyn's Foundry (Pty.) Ltd. v. Peacock* 1965 (4) S.A. 549 (T); *Sarann Furnishers*, 1966 (3) S.A. 48 (N).
80. *Sed contra, semble, Cornforth*, (1922) 43 N.L.R. 116, 124; *Shembe*, 1972 (1) S.A. 174 (D) 175; Joubert, 90 S.A.L.J., 42-3.
81. Joubert, 90 S.A.L.J., 42; DE WET & YEATS, KONTRAKTEREG 115 (3rd ed.); 151-2 (4th ed.).
82. KERR, CONTRACT 416-7.
83. *Cf.*, *Johnson v. Agnew*, [1980] A.C. 367.
84. *Shakinowsky v. Lawson & Smulowitz* 1904 T.S. 326, 330.
85. *Id.*, 331.
86. *Woods v. Walters* 1921 A.D. 303, 310; *ISEP Structural Engineering & Plating (Pty.) Ltd. v. Inland Exploration Co. (Pty.) Ltd.* 1981 (4) S.A. 1 (A) 6G.
87. *Woods*, 1921 A.D., 310.
88. *Norden v. Rennie* 1879 Buchanan 155; *National Butchery Co. v. African Merchants Ltd.* 1907 E.D.C. 57, 61.
89. *Symmonds v. Rhodesia Railways Ltd.* 1917 A.D. 582; *Geldenhuis and Neethling v. Beuthin* 1918 A.D. 426; *Fluxman v. Brittain* 1941 A.D. 273.
90. *Shembe*, 1972 (3) S.A., 475 *per* Van Winsen A.J.A.
91. 1903 T.S. 651.
92. *Ras*, 1905 T.S. 254.
93. 1912 E.D.L. 33.
94. "... the learned Judge who tried the case ... ordered that transfer of this farm should be given, failing which that defendant should pay the sum of £50 as damages": *id.*, 34-5.
95. *Id.*, 35.
96. (1909) 30 N.L.R. 76.
97. *Id.*, 79.
98. *Id.*, 81.
99. 21 S.A.L.J. 372 (1904); 32 S.A.L.J. 205 (1915); 35 S.A.L.J. 52 (1918).
100. 32 S.A.L.J., 206-7; *Girvin*, 105 S.A.L.J. 479 (1988).
101. *Kahn*, 104 S.A.L.J. 220, 223 (1987).
102. J. DOVE WILSON, THE PRACTICE OF THE SHERIFF COURTS OF SCOTLAND IN CIVIL CAUSES (4th ed. by J.C. Dove Wilson; 1891).
103. MACKEURTAN'S SALE OF GOODS IN SOUTH AFRICA 285 (5th ed. by G.R.J. Hackwill; 1984).
104. *Id.*, 285 n. 27.
105. *Cornforth, supra* n. 78.
106. *Magnet Motor Co. v. Bernstein* 1929 T.P.D. 431, 434.
107. MACKEURTAN, SALE 285-6.
108. DE WET & YEATS, KONTRAKTEREG, 156 (3rd ed.); 197-9 (4th ed.); referred to by Joubert, 90 S.A.L.J., 44.

109. 90 S.A.L.J., 44.
110. 1949 (4) S.A., 36-7.
111. R. v. Sussex Justices [1924] 1 K.B. 256, 259; HAHLO & KAHN, THE SOUTH AFRICAN LEGAL SYSTEM 49 and n. 93; 62 and n. 48.
112. Evans, 1949 (4) S.A., 37.
113. 2 JOUBERT, THE LAW OF SOUTH AFRICA para. 350 and n. 1 (p. 165).
114. 1926 A.D. 173, 187. See, also, 188.
115. A claim for supplementary damages for delay in performance is compatible with a claim for specific performance: Silverton Estates Co. v. Bellevue Syndicate 1904 T.S. 462, 470; Eisele v. Aurret 1904 T.H. 156; Stacey v. Sims 1917 C.P.D. 533; Clark v. Muller (1914) 35 N.L.R. 18; KERR, CONTRACT 413-4.
116. Cf., Hetherington's criticism of Lord Wilberforce's ruling in *Johnson* [1980] A.C., 399E-H that the court supervises the judgment creditor's cancellation: 96 L.Q.R. 403, 408-10 (1980).
117. 1915 A.D. 1, 22; Holmdene Brickworks (Pty.) Ltd. v. Roberts Construction Co. Ltd. 1977 (3) S.A. 670 (A) 687C; Katzenellenbogen Ltd. v. Mullin 1977 (4) S.A. 855 (A) 875C; Bellairs v. Hodnett and Another 1978 (1) 1109 (A) 1146H.
118. 1 Ex. 850, 855 (1848); 154 E.R. 363, 365; Wertheim v. Chicoutimi Pulp Co. [1911] A.C. 301; Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 K.B. 528 (C.A.) 539; *Johnson* [1980] A.C., 400H.
119. Novick v. Benjamin 1972 (2) S.A. 842 (A) 859E.
120. *South Africa. Appellate Division*: Novick v. Benjamin 1972 (2) S.A. 842, 859D, 860B-F. Trollip J.A., however, did observe that the date of performance may diverge from the date of breach where the breach is anticipatory: 860G-H. See, also, Whitfield v. Phillips and Another 1957 (3) S.A. 318 (*sed contra* Hoexter J.A.); Katzenellenbogen Ltd. v. Mullin 1977 (4) S.A. 855, 875C, 879G-H. At 880B Wessels J.A. held that the litigant seeking to avail himself of a measure other than the normal one bears the *onus probandi* that his alleged measure is appropriate to the circumstances. We presume that a litigant adopting Kerr's approach, *infra* Appendix B, would bear such an *onus*.  
*Cape*: Stewart v. Ryall (1887) 5 S.C. 146, 157 (by implication); Kaplan Bros. v. Kroomer 1920 C.P.D. 618, 620; Frankel & Co. v. Michalowsky 1926 C.P.D. 696, 699; Kritzing v. Marchand & Co. 1926 C.P.D. 397, 399; Markus & Co. v. Louw 1930 C.P.D. 123, 128.  
*Transvaal*: Atkins & Co. v. Dennill 1905 T.H. 83, 87; on appeal, 1905 T.S. 282, Innes C.J. mistook the English law as epitomized in Sale of Goods Act 1893, ss. 50(3), 51(3); Mills v. Schahmann Bros. 1909 T.S. 738 (split: Innes C.J.--cancellation; Solomon J.--breach); Durr v. Buxton White Line Co. 1909 T.S. 871, 880-1; S.A. Railways v. Theron 1917 T.P.D. 67; Broughton v. Davis 1921 T.P.D. 409, 410-11; Slotar & Sons v. De Jongh 1922 T.P.D. 327, 329; Hersman v. Shapiro & Co. 1927 T.P.D. 367, 378; Kameel Tin Co. (Pty.) Ltd. v. Brollomar Tin Exploration Ltd. 1928 T.P.D. 726, 732; Serman & Co. v. Brown 1939 T.P.D. 244; Bester v. Visser 1957 (1) S.A. 628 (T); Garavelli and Figli v. Golloch and Gomperts (Pty.) Ltd. 1959 (1) S.A. 816 (W) 819F, 280A-B; Desmond Isaacs Agencies (Pty.) Ltd. v. Contemporary Displays 1971 (3) S.A. 286, 287B, 289F-G.  
*Orange Free State*: Ruffel v. Webb 1919 O.P.D. 122, 127; M. Levisur & Co. v. Highveld Supply Stores 1922 O.P.D. 233.  
*Natal*: Oellerman v. Natal Indian Traders, Ltd. 1913 N.P.D. 337, 340-1; Pretoria Light Aircraft Co. Ltd. v. Midland Aviation Co. (Pty.) Ltd. 1950 (2) S.A. 656, 663.

*Eastern Cape*: Cowley and Another v. Hahn 1987 (1) S.A. 440, 448D.

7 JOUBERT, THE LAW OF SOUTH AFRICA para. 51 (pp. 28-9).

*Britain. England*: Dutch v. Warren, 2 Burr. 1010; 97 E.R. 680; Sanders v. Hawksley, 8 Term Rep. 162 (1799); 101 E.R. 1323; Isherwood v. Seddon 102 E.R. 350, *arguendo*; Leigh v. Paterson, 8 Taunt. 540 (1818); 129 E.R. 493; Gainsford v. Carroll, 2 B. & C 624 (1824); 107 E.R. 516-- P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 425 (1979); Boorman v. Nash, 9 B. & C. 145 (1829); 109 E.R. 54; Phillpotts v. Evans, 5 M. & W. 475 (1839); 151 E.R. 200; Shaw v. Holland, 15 M. & W. 136 (1846); 153 E.R. 794; Tempest v. Kilner, 3 C.B. 249 (1846); 136 E.R. 100; Barrow v. Arnaud, 8 Q.B. 595 (1846); 115 E.R. 1000; Rice v. Baxendale, 7 H. & N. 96 (1861); 158 E.R. 407; Brady v. Oestler, 3 H. & C. 112 (1864); 159 E.R. 469; Williams v. Reynolds, 6 B. & S. 495 (1865); 122 E.R. 1278; O'Hanlan v. G.W. Ry. Co., 6 B. & S. 484 (1865); 122 E.R. 1274; Ogle v. Earl Vane, L.R. 2 Q.B. 275, 281 (1867) upheld in L.R. 3 Q.B. 272 (Ex. Ch.); Ashmore & Son v. Cox & Co. [1899] 1 Q.B. 436, 443; Diamond v. Campbell Jones [1961] 1 Ch. 22, 36-7; Wroth v. Tyler [1974] 1 Ch. 30, 56F-G; Johnson, [1980] A.C. 367, 400-1; The "Ile aux Moines" [1974] 1 Lloyd's Rep. 263; Johnson Matthey Bankers Ltd. v. State Trading Corp. of India [1984] 1 Lloyd's Rep. 427; County Personnel (Employment Agency) Ltd. v. Pulver [1987] 1 All E.R. 289, 297j.

*Scotland*: Ströms Bruks A.B. v. Hutchison, 1905, 7 F. (H.L.) 131, 134; Marshall & Co. v. Nicoll & Son 1919 S.C. (H.L.) 129, 130, 131; Spencer v. Macmillan's Trs. 1958 S.C. 300, 316, 317, 318, 320, 321 (2d Div.).

*Canada*: Remer Bros. Investment Corp. v. Robin [1966] S.C.R. 506, 511, 512; Asamera Oil Corp. Ltd. v. Sea Oil & General Corp. (1978) 89 D.L.R. (3d) 1, 10, 11 (S.C.C.); Harvey Foods Ltd. v. Reid (1971) 18 D.L.R. (3d) 90, 93.

121. *Asamera Oil*, *supra* note 120, 10.

122. In *Asamera Oil*, *id.*, 10, Estey J. discussed Asquith L.J.'s first three principles in *Victoria Laundry* [1949] 2 K.B. 528, 539, as qualified by *Koufos v. C. Czarnikow Ltd.* [1969] 1 A.C. 350 and *Brown & Root Ltd. v. Chimo Shipping Ltd.* (1967), 63 D.L.R. (2d) 1, 6 and discussed by the English Court of Appeal in *Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd.* [1977] 2 Lloyd's Rep. 522, 529, 528.

123. On the mitigation rule as the reason behind the breach-date assessment, *see*, also, *Radford v. De Froberville* [1978] 1 All E.R. 33, 55j-56c.

124. Turpin, ANNUAL SURVEY OF SOUTH AFRICAN LAW 1957 95; KERR, SALE 106-9, 329-32. DE WET & YEATS, KONTRAKTEREG 210 criticize the general working rule but do not reject it, as Kerr does: they call for its careful application so that the *Victoria Falls* principle is advanced. For discussion of Kerr's authority, *see* Appendix B.

125. *Cooper v. Kohn's Produce Agency Ltd.* 1917 T.P.D. 184, citing *Celliers v. Papenfus and Rooth* 1904 T.S. 73 (cancellation) and *S.A.R. v. Theron* 1917 T.P.D. 67 (breach). Despite *Oellerman*, *supra* note 120, Dove Wilson J.P. in *Amod Bayat v. Doherty* 1919 N.P.D. 44, 47 held that the law was certain, approved what he considered Bristowe J.'s clear exposition of it in *Cooper*, then summarized *Theron* as fixing the assessment date as that "when delivery should have taken place." On Kerr's interpretation of *Cooper* (see Appendix B), a contradiction therefore arose between *Cooper* and *Theron*. In *Serman & Co.*, *supra* note 120, having confirmed breach as the decisive date (247-8), Barry A.J.P. applied *Cooper* without explaining how he interpreted "repudiation." Greenberg J., who in *Kameel Tin*, *supra* note 120, had confirmed the date of breach, in





141. BUCKLAND, TEXT-BOOK 486, 494.
142. INST. GAI. 4.47. *See, also*, BUCKLAND, TEXT-BOOK, 681: "Ulpian [DIG. JUST. 13.6.3.2.] tells us that in *stricta iudicia* the *interesse* was to be valued as at *litis contestatio*, in *b.f. iudicia* as at judgement." The *condictio triticaria* for certain quantities of fungibles was assessed as at the date fixed for performance: Joubert, 36 T.H.R.-H.R., 58 and n. 60.
143. [1980] A.C. 367 (H.L.)(E.).
144. MEAGHER, GUMMOW, & LEHANE, EQUITY ch. 23, esp. 612-5. *See, also*, Jolowicz [1975], 34 C.L.J. 224; Ingman & Wakefield, 45 CONV. 286 (1981).
145. *Supra* chapter 9.
146. (20 & 21 Vict. c. 27).
147. (c. 54).
148. Jolowicz, 34 C.L.J., 234 on Wroth v. Tyler, [1974] Ch. 30: "the only real point of novelty in the case was the novelty of rapidly rising prices." *See, also* Staughton J.'s comments on Dodd Properties (Kent) Ltd. v. Canterbury C.C. [1980] 1 W.L.R. 433, in The "Good Friend" [1984] 2 Lloyd's Rep. 586, 596; and Spandau, 92 S.A.L.J. 31 (1975).
149. [1974] Ch. 30.
150. *Id.*, 58F.
151. (1880) 14 Ch.D. 542.
152. (1889) 23 Q.B.D. 294 (C.A.)
153. Wroth, [1974] Ch. , 60D.
154. [1963] V.R. 465.
155. *Id.*, 490, lines 26-30.
156. MEAGHER *et al.*, EQUITY, 612-3.
157. [1973] 3 All E.R. 897.
158. MEAGHER *et al.*, EQUITY, 613, citing Austin, 48 A.L.J. 273 (1974). *See, also*, Pettit, 90 L.Q.R. 297 (1974).
159. MEAGHER *et al.*, EQUITY, 613.
160. [1974] 2 N.Z.L.R. 515.
161. *Id.*, 520-1.
162. *Id.*, 520, lines 41-3.
163. [1975] 2 N.Z.L.R. 586.
164. [1977] 2 N.Z.L.R. 71.
165. *Id.*, 79.
166. *Metropolitan Trust, supra* n. 137. It should be noted, however, that Holland J.'s Canadian citations (37 D.L.R. (3d), 671) had applied the common law standard of breach-date assessment: *Horsnail v. Shute* (1921) 62 D.L.R. 199; *Harvey Foods Ltd. v. Reid* (1971), 18 D.L.R. (3d) 90; *Remer Bros. Investment Corp. v. Robin* [1966] S.C.R. 506.
167. (1977), 74 D.L.R. (3d) 284, *obiter* (297), 295-7.
168. *Asamera Oil, supra* n. 120, 25.
169. (1976), 75 D.L.R. (3d) 368.

170. *Id.*, 378.
171. (1959), 20 D.L.R. (2d) 164.
172. *Kaunas*, *supra* note 169, 377.
173. [1980] Ch. 52 (C.A.).
174. MEAGHER *et al.*, EQUITY, 613; Ingman & Wakefield, 45 CONV., 296-7.
175. *Malhotra*, [1980] Ch., 78-9.
176. Ingman & Wakefield, 45 CONV., 297.
177. [1980] A.C., 400F-G.
178. [1978] 1 All E.R. 33.
179. *Id.*, 56f.
180. [1980] A.C. 367.
181. *Id.*, 400A.
182. *Id.*, 400B-G.
183. (1866) L.R. 2 Ch. 77, 88 *per* Turner L.J., *Ld.* Cairns present.
184. (1882) 52 L.J. Ch. 214.
185. FRY, SPECIFIC PERFORMANCE 602 (6th ed.).
186. [1973] 1 W.L.R. 1406.
187. [1975] Ch. 302, 316 *per* Megarry J.
188. [1980] A.C., 400H-401E.
189. *Cf.*, *Novick* 1972 (2) S.A., 859D-F.
190. *Johnson* concerned land, not goods.
191. [1978] 1 All E.R., 56g-h.
192. [1984] 1 Lloyd's Rep. 427.
193. *Id.*, 437.
194. *Cf.*, Treitel, [1966] J.B.L., 212.
195. MEAGHER *et al.*, EQUITY, 614.
196. [1980] A.C., 384C.
197. *Id.*, 390C.
198. [1978] 1 All E.R. 55h, 56e.
199. HAHLO & KAHN, S.A. LEGAL SYSTEM 136 and n. 15 (no division between law and equity).
200. *Id.*, 244 (House of Lords); *a fortiori*, Chancery Division.
201. *Novick*, 1972 (2) S.A., 859D-F.
202. *Cf.*, Sale of Goods Act 1979, ss. 50(3), 51(3).
203. 1986 (1) S.A. 776 (A) 782H-I (*italics supplied*).
204. 44 HALSBURY'S LAWS OF ENGLAND para. 560 (pp. 382-3).
205. *Id.*, Vol. 42 para. 269 (pp. 186-7).
206. [1980] 1 Ch. 548 (C.A.), 559G.
207. 1904 T.S. 73, 84; KERR, SALE 106, 331, strengthened now by *Benson* 1986 (1) S.A. 776 (A), so that some of Kerr's qualifications would perhaps be withdrawn.
208. [1980] 1 Ch., 548B.





- LIFE AND TIMES 329 (1973). Jean Untermeyer translates the idea behind the German as "God casts the die, not the dice": HOFFMAN & DUKAS, *supra* n. 229, 193. Debate among the congress members became so clamorous that Ehrenfest wrote on the blackboard: "The Lord did there confound the language of all the earth": CLARK, 329. To counter Bohr's theories, Einstein posed "thought experiments" and collaborated on a paper whence derived the "Einstein-Podolsky-Rosen paradox." Bohr replied with papers such as *Discussion with Einstein on Epistemological Problems in Atomic Physics*, included in P.A. SCHILLP (ed.), ALBERT EINSTEIN: PHILOSOPHER-SCIENTIST 201 (3d ed., 1970). The differences extended into metaphysical conceptions of the nature of science. See, HOFFMAN AND DUKAS, 187-92, 195-9; PAIS, 455-7; Rosenberg, 155; MACKINNON, *passim*; ROZENTAL, 127-30, 179-81, 225. Recent research by Aspect and colleagues in Paris seems to have proved Bohr right and Einstein wrong: P. DAVIES, GOD AND THE NEW PHYSICS 106 (1983).
239. Kaiser's ch. 5 on Bohr's critics discusses the views of Planck, Einstein, de Broglie, Bohm, Cassirer, Margenau, Lande, Popper, Bunge and Feyerabend. In ch. 4, Bohr's allies on complementarity are Rosenfeld, Pauli, Heisenberg, von Wieszäcker, Born, Jordan, Elsasser, Frank, Reichenbach, Wheeler, Feynman, Meyer-Abich, and Oppenheim. Their interpretations of the principle vary (176).
240. See Kaiser, ch. 3 and Part II.
241. Nienaber, 30 T.H.R.-H.R., 354.
242. P.M.A. Hunt in ANNUAL SURVEY OF SOUTH AFRICAN LAW 1962 119; Heathcote v. Stutterheim Municipality 1963 (3) S.A. 35 (E); G & G Investment and Finance Corp. (Pty.) Ltd. v. Kajee and Others 1962 (2) S.A. 73 (D); KERR, CONTRACT 162. In the 3d ed., 272-4, Kerr does not seem to deny the existence of the agreement but to aver that what the non-fulfilment of the suspensive condition may prevent is the effect of the agreement. Existence and effect are not the same concept.
243. KERR, CONTRACT 275-80; 5 JOUBERT, THE LAW OF SOUTH AFRICA para. 184 (pp. 98-9).
244. 3 JOUBERT, THE LAW OF SOUTH AFRICA para. 187 (pp. 101-2).
245. *Id.*, Vol. 7, para. 18 (pp. 11-2).
246. GLOAG, CONTRACT 657; GLOAG & HENDERSON, INTRODUCTION 143, 215 (9th ed., 1987); SMITH, SHORT COMMENTARY 854-5 n. 7; WALKER, REMEDIES 278, 280, 660; PRINCIPLES, Vol. II, 160 n. 97; CONTRACTS 541 n. 18, 542 n. 6 (2d ed., 1985); W.W. McBRYDE, CONTRACT 509, 513.
247. GLOAG, CONTRACT 657 and n. 3.
248. 1860, 22 D. 665, 671.
249. 1889, 30 S.L.R. 2, 6.
250. 1913 S.C. 954, 958.
251. GOW, MERCANTILE LAW 219 n. 26.
252. Nutbrown, *supra* chapter 10, pp. 210-1.
253. *Supra* chapter 9.
254. JONES & GOODHART, SPECIFIC PERFORMANCE 113 nn. 16, 17.
255. *Supra* chapter 11, pp. 237-9.
256. *Supra* pp. 250-1.

257. 1916 S.C. 882, *infra* chapter 13.
258. G.C. CHESHIRE & P.M. NORTH, PRIVATE INTERNATIONAL LAW 337 (11th ed., 1987); 1 A.V. DICEY & J.H.C. MORRIS, CONFLICT OF LAWS 418-9 (11th ed., 1987). *Cf.*, also, Dr Bisschop's evidence of the Dutch Civil Code's provisions: Tallack v. Tallack and Brockema [1927] P. 211, 213, 217.
259. Cochran v. Earl of Buchan, 1698, M. 4544; ERSKINE, INST. 4.3.4.; G. DUNCAN & D.O. DYKES, THE PRINCIPLES OF CIVIL JURISDICTION AS APPLIED IN THE LAW OF SCOTLAND 308 (1911); A.E. ANTON, PRIVATE INTERNATIONAL LAW 572 (1967); 8 HALSBURY'S LAWS OF ENGLAND para. 401 (p. 307), para. 743 (p. 487) (1974). *Cf.* the effect of the decision in *Re Dundee & Suburban Ry. Co.* (1888) 58 L.J. Ch. 5.
260. *In re Orr Ewing* (1882) 22 Ch. 456, 464-5 (C.A.).
261. Act of Union 1706 (5 Anne c. 7).
262. SMITH, SHORT COMMENTARY 87-9.
263. CHESHIRE & NORTH, PRIVATE INTERNATIONAL LAW 338; 1 DICEY & MORRIS, CONFLICT OF LAWS 420-1; J.H.C. MORRIS, THE CONFLICT OF LAWS 106 (3d ed., 1984).
264. 1 DICEY & MORRIS, CONFLICT OF LAWS 420-1; ANTON, PRIVATE INTERNATIONAL LAW 573.
265. 9 M. & W. 810, 819 (1842); 152 E.R. 343, 347, *per* Parke B.
266. 13 M. & W. 628, esp. 633 (1845); 153 E.R. 262, 264-5, *per* Parke B.; quoted by ANTON, PRIVATE INTERNATIONAL LAW 573 and n. 8.
267. (1870) L.R. 6 Q.B. 139, 148, *per* Blackburn J.; CHESHIRE & NORTH, PRIVATE INTERNATIONAL LAW 338 and n. 7.
268. (1870) L.R. 6 Q.B. 155, 159; CHESHIRE AND NORTH, PRIVATE INTERNATIONAL LAW 338 and n. 8.
269. MORRIS, THE CONFLICT OF LAWS 125. *See*, also, 8 HALSBURY'S LAWS OF ENGLAND para. 731 (p. 482).
270. *Id.*, n. 37, citing *Sadler v. Robins*, 1 Camp. 253 (1808); 170 E.R. 948.
271. *Id.*, n. 38, citing *Russell v. Smyth*, 9 M. & W. 810.
272. *Id.*, n. 39, citing *Duke v. Andler* [1932] 4 D.L.R. 529 (S.C.C.)
273. M. WOLFF, PRIVATE INTERNATIONAL LAW para. 243 (p. 265) (2d ed., 1950).
274. 1 DICEY & MORRIS, CONFLICT OF LAWS 426 and n. 50.
275. CHESHIRE & NORTH, PRIVATE INTERNATIONAL LAW 360.
276. *Grant v. Easton* (1883) 13 Q.B.D. 302, 303 (C.A.), quoted by CHESHIRE & NORTH, PRIVATE INTERNATIONAL LAW 338-9 and n. 9.
277. The image is Lord Atkin's: *United Australia Ltd. v. Barclays Bank* [1941] A.C. 1, 29.
278. HOLDSWORTH, 11 H.E.L. 272; White, 9 SYDNEY L. REV. 630, 631 (1982).
279. Judgments Extension Act 1868.
280. Inferior Courts Judgments Extension Act 1882.
281. *Wotherspoon v. Connolly*, 1871, 8 M. 510, 513 (1st Div.). *See*, also, *Fontaine's Case* (1889) 41 Ch.D. 118; *In re Dundee and Suburban Ry. Co.*, *supra* n. 259.

282. MAITLAND, THE FORMS OF ACTION 1.
283. Gordon, 49 L.Q.R. 547, 553 (1933) asserts that Dicey's citations in the 5th edition at 467 do not bear Dicey out; but Gordon concedes that Dicey's language probably does represent the traditional view of the common law courts.
284. Prosser, 51 MICH. L. REV. 959, 971 (1953), quoted by MORRIS, THE CONFLICT OF LAWS 9 and n. 33.
285. Cf., White, 9 SYDNEY L. REV., 638-9.
286. See, e.g., Henderson v. Henderson, 6 Q.B. 288 (1844); 115 E.R. 111.
287. 5 H.E.L. 157 and n. 1, 159 and n. 5; 10 HALSBURY'S LAWS OF ENGLAND para. 709 and nn. 4, 13 (pp. 319-20) (1975).
288. (36 & 37 Vict. c. 66).
289. Henderson, *supra* note 286, at 297; 115.
290. Administration of Justice Act 1920 (10 & 11 Geo. 5 c. 81): see the list in 8 HALSBURY'S LAWS OF ENGLAND para. 752 n. 4 (pp. 491-2) (1974), as read with 1988 CUMULATIVE SUPPLEMENT, Part 1, Vol. 8, para. 752 (p. 61).
291. Foreign Judgments (Reciprocal Enforcement) Act 1933 (23 & 24 Geo. 5 c. 13): see the list in 8 HALSBURY'S LAWS OF ENGLAND para. 757 n. 4 (p. 494), as read with 1988 CUMULATIVE SUPPLEMENT, Part 1, Vol. 8, para. 757 (p. 61).
292. Civil Jurisdiction and Judgments Act 1982 (c. 27).
293. *Supra* pp. 286-7.
294. SPRY, EQUITABLE REMEDIES 37-51.
295. *Id.*, 37.
296. *Infra* chapter 13.
297. SPRY, *supra* note 294, 37-8.
298. Compagnia de Mocambique v. British South Africa Co. [1892] 2 Q.B. 358, 364 (C.A.), *per* Wright L.J.
299. SPRY, *supra* note 294, 38.
300. Drummond v. Drummond (1866) L.R. 2 Ch. 32, 43, *per* Turner L.J.
301. Siskina v. Distos Compania Naviera S.A. [1979] A.C. 210.
302. SPRY, *supra* n. 294, 39.
303. *Id.*, 39-40. In Rockware Glass Ltd. v. MacShannon [1978] A.C. 795, 812, Ld. Diplock held: "In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court" (A-B).

It is thought that the stay would seldom be granted by a Scots court: specific implement is available as an ordinary legal remedy subject to the court's discretion to refuse it on good cause shown. So, unless the other forum treats specific implement similarly, the Scots pursuer is deprived of a legitimate personal or juridical advantage available in the Scots court. Condition (b) of Ld. Diplock's test would be left unsatisfied in any court following the English approach to specific performance as an extraordinary, equitable remedy.



- 304. SPRY, *supra* n. 294, 40-1 and nn. 14, 15.
- 305. *Id.*, 42.
- 306. *Id.*, 42-3.
- 307. *Id.*, 43, n. 21, citing *Hunter v. Hunter* [1962] P. 1, 6.
- 308. *Id.*, 43, n. 22, quoting *Polack v. Schumacher* (1869) 3 South Australian Law Reports 76, 79, and citing *Hope v. Hope*, 4 De G.M. & G. 328 (1854); 43 E.R. 534 and *Wylar v. Lyons* [1963] P. 274.
- 309. SPRY, *id.*, 43 n. 23, quoting *In re Liddell's Settlement Trusts* [1936] Ch. 365, 374 (C.A.); *Castanho v. Brown & Root (U.K.) Ltd.* [1981] A.C. 557, 574.
- 310. SPRY, *id.*, 43 n. 24, citing *Cammell v. Cammell* [1965] P. 467; *The Conoco Britannica* [1972] 2 Q.B. 543.
- 311. [1972] 2 Q.B. at 555D-G.
- 312. [1892] P. 304.
- 313. [1899] P. 285.
- 314. (15 & 16 Geo. 5 c. 49).
- 315. (4 & 5 Eliz. 2 c. 46).
- 316. (14 Geo. 6 c. 25).
- 317. [1965] P. 467, 470.
- 318. [1927] P. 211.
- 319. [1963] P. 274.
- 320. *Guardianship of Infants Act 1925* (15 & 16 Geo. 5 c. 45), s. 1.
- 321. *Cammell*, [1965] P. 472.
- 322. [1962] P. 1.
- 323. I deduced this implication by considering *Union Electric*, the facts of *Wylar*, *supra* n. 308, and the words of Lord Cranworth L.C. in *Hope*, *supra id.*, at 346; 541.
- 324. *Supra* n. 308.
- 325. [1981] A.C. 557.
- 326. *Id.*, 574B-C.
- 327. [1936] Ch. at 373.
- 328. I have explained why this may be impossible: *supra* n. 303.
- 329. *See the treatment of Aurdal, infra* chapter 13.

### Chapter 13: Aurdal v. Estrella (1916) and Mackay v. Campbell (1967)

#### Aurdal v. Estrella<sup>1</sup>

On 17 November 1915 in London the Norwegian pursuers agreed to buy the Spanish defenders' *Elorrio*, which would be delivered in Britain. After it was pronounced ready for delivery at Troon, the pursuers, having performed their obligations, asked the defenders to perform theirs by executing a bill of sale in the pursuers' favour. The defenders explained that, willing as they were to do so, their king had decreed on 7 January 1916 that certain Spanish vessels, theirs being one, should not be sold to foreigners, and so loyal obedience prevented their performance. The pursuers claimed specific implement, failing which, damages. To clear the obstacle of the Royal Decree, during litigation the pursuers contracted to resell the ship to Otero, a San Sebastian shipowner, and then amended the summons so as to require delivery of the bill of sale to him if not to them.

The Second Division refused to grant specific implement to the pursuers. Difficulties of enforcement,<sup>2</sup> and the likelihood of inconvenience and injustice,<sup>3</sup> brought the case within the sphere of the judicial discretion established by *Moore v. Paterson*<sup>4</sup> and *Stewart v. Kennedy*.<sup>5</sup> Further, the defenders were a foreign company.<sup>6</sup>

*Aurdal* illustrates the complexities of characterization. By prevailing trends of international private law, obligatory aspects of a contract are mostly decided according to the proper law of the contract.<sup>7</sup> Proprietary aspects of a contract, including whether a person has a right of ownership in the disputed moveable, are determined by the law of the place where the thing is situated at the time when the proprietary right in question is assigned (the *lex situs*).<sup>8</sup> The Second Division held that the proper law of the contract between the Norwegians and Spaniards-- the legal system intended to govern the contract, or with which the transaction was most clearly connected-- was British: the Lord Ordinary's pronouncement<sup>9</sup> was tacitly followed, in that, apart from the Royal Decree, an absence of differences between Spanish law and Scots law was assumed,<sup>10</sup> and Scots doctrines of specific implement<sup>11</sup> and Scots and English doctrines of mode of performance and *delectus personae* were applied.<sup>12</sup>

It is the proprietary effect of the contract and the means effecting transfer of ownership that give rise to uncertainties about the correct characterization. The general principle favouring the *lex situs* appears to admit of two exceptions: a "merchant ship may at some times be deemed to be situate at her port of registry";<sup>13</sup> and, similarly, a "civil aircraft may at some times be deemed to be situate in its country of

registration."<sup>14</sup> As Turner L.J. held in *Hooper v. Gumm*, "A ship is not like an ordinary personal chattel; it does not pass by delivery, nor does the possession of it prove the title to it."<sup>15</sup> Dicey and Morris continue:<sup>16</sup>

[T]here are dicta indicating that a ship is situate in law at her port of registry and not where she is physically situate from time to time.<sup>17</sup> This rule was adopted for a limited purpose by the legislature,<sup>18</sup> and would seem to be both convenient and sound in principle when the vessel is upon the high seas. Where, however, a vessel is within territorial or national waters the reasons for ascribing her a *situs* at her port of registry are not compelling, and the artificial *situs* is displaced by the actual *situs*.<sup>19</sup> Thus the English courts would not recognize the validity of a foreign government's interference with vessels wearing its flag present within English waters.<sup>20</sup>

Two different approaches were therefore possible.

1. **The law of the port of registry** This formed the ground of the defenders' argument: "a ship was regarded in much the same light as was heritage, and was governed by the law of the flag."<sup>21</sup> The contract was unenforceable; the Royal Decree forbade the defenders to execute a bill of sale for the pursuers; and the entry in the Spanish register could not be cancelled as a prelude to registration in the British register. The purpose of the contract was frustrated.<sup>22</sup>

Had the Second Division adopted the comparison between ships and land, and hence the English rules on equitable decrees concerning foreign land, the defenders would have been exempted from specific performance, whether to the pursuers or to their Spanish nominee. By the *Mocambique* rule,<sup>23</sup> now corroborated in the Civil Jurisdiction and Judgments Act 1982,<sup>24</sup> English courts refrain from directly determining the title to or rights to possession of land or immoveables situated in a foreign country.<sup>25</sup> To this general prohibition there is an exception, declared in cases such as *Penn v. Lord Baltimore*<sup>26</sup> and *Deschamps v. Miller*,<sup>27</sup> that proceedings are competent when the "action is based on a contract or equity between the parties."<sup>28</sup> The court then orders specific performance against a defender properly served who is within its power, acting *in personam*, if necessary, to compel his obedience. In turn, however, this contractual and equitable exception falls away if the *lex situs* prohibits the enforcement of the decree.<sup>29</sup> In *Re Courtney* Lord Cottenham L.C. held:<sup>30</sup>

If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment, the courts of this country, in the exercise of their jurisdiction over contracts here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effects of such a contract might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.

The degree of stringency needed to dissuade an English court from granting the decree is unclear.<sup>31</sup> Indeed, the passage almost contradicts itself.<sup>32</sup> At any rate, if a ship is governed by the law of the port of registry and resembles land, then Turner V.-C.'s ruling in *Waterhouse v. Stansfield*<sup>33</sup> is relevant to *Aurdal*: "When the law of a foreign country places a restraint upon the alienation of the property of a debtor situated in such country, an equity arising here on a contract entered into in respect of such property cannot be enforced against the *lex loci rei sitae*." So on this approach the Second Division would have refused specific implement of the contracts of sale and resale.

2. **The *lex situs*** This appears to have been the implicit ground of the Second Division's judgment. The vessel being in Scots waters, Scots courts had jurisdiction to determine questions of title directly and could also ordain implement of the contract by an alternative mode which the pursuers had created. The approach reveals contradictions about difficulties of enforcement and of performance.

In their zeal to uphold the contract by sanctioning the alternative mode of performance, may not the judges have succumbed to the haste which Lord Dundas<sup>34</sup> had taxed the Lord Ordinary with for having decided that the agreement was a sale rather than an agreement to sell? The main grounds for refusing specific implement to the pursuers were that the Norwegians were hit by a Spanish ban and that the defenders were a Spanish company. The first problem was resolved by the finding of an alternative mode of performance; but the second problem remained-- the judges appear to have overlooked the fact that a decree of specific implement, even if granted to a Spaniard rather than a Norwegian, would prove no less difficult for a Scots court to enforce against the same defending Spanish company. As the Second Division was so ready to ordain specific implement in favour of Otero if his Spanish citizenship was established,<sup>35</sup> perhaps the difficulties of enforcement professed to exist in relation to a foreign company should be discounted as exaggeration. The judicial zeal in ordaining specific implement if at all possible therefore supports the submission that if the

problems of *forum non conveniens*, injustice, and unreasonableness can be overcome, then the decree of specific implement should be granted to a pursuer desiring it.<sup>36</sup>

A Lacedaemonian if, however, remained as to the injustice and unreasonableness of ordaining a decree which the Spaniards might find illegal and impossible to perform. *Moore* and *Stewart* were cited. Yet, adopting in effect an approach similar to that suggested by the second half of Lord Cottenham L.C.'s pronouncement,<sup>30</sup> by discovering an alternative mode of performance whereby the defenders might satisfy the court's decree without infringing the Royal Decree, the Second Division applied principles of British law<sup>37</sup> which might still have required the defenders to do in Spain what was illegal and impossible. How could that be, one may object, if Otero was proved to be a Spanish citizen? The answer lies in the Spanish Government's interpretation of the Royal Decree: the Director General of Commerce, Industry and Labour wrote the defenders this letter, the following English translation of which is among the process papers in West Register House:<sup>38</sup>

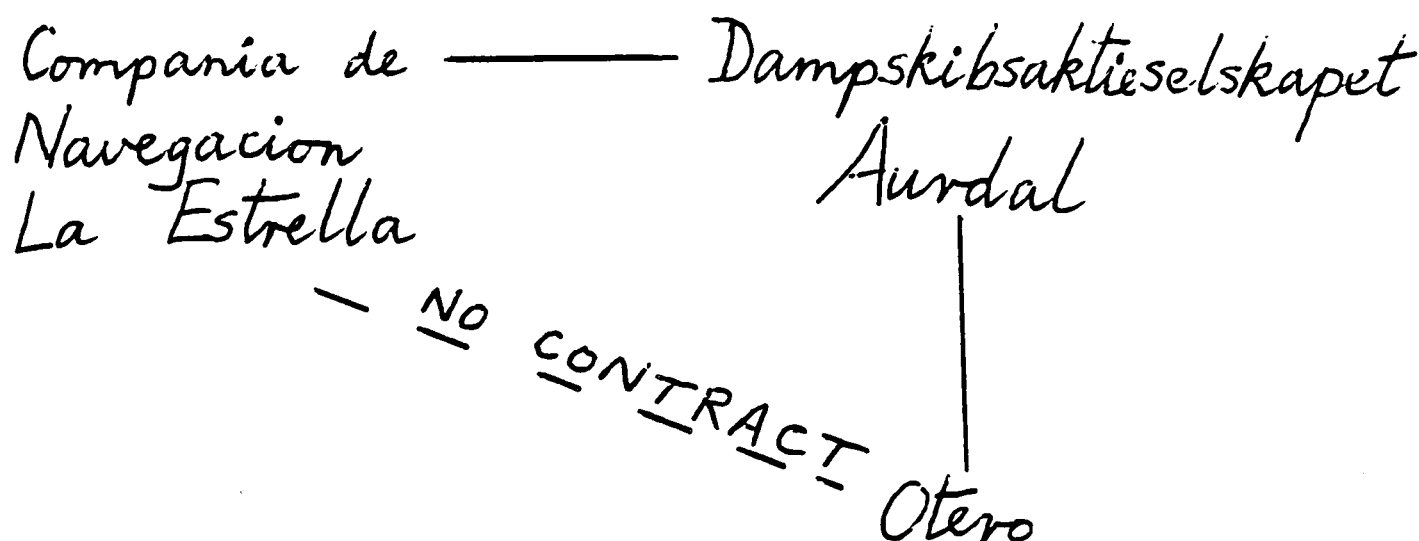
In view of the petition made by you as Managing Director of the Compania de Navegacion "La Estrella", owner of the steamer "ELORRIO" asking that this Ministry should define whether the transfer of the said vessel to the Spanish subject Don Blas Otero, or to any other buyer, whatsoever may be his nationality, can be effective or whether the effects of the Royal Order of the 14th April prohibiting the sale of the said steamer to a foreign country, shall apply to it. Whereas, as you mention in your petition, the buyers applied to a Scotch Tribunal claiming ratification of the sale, or if this were not possible, on account of the Royal Decree of the 7th of January last being opposed to it they should be authorised to transfer the ownership of the steamer "ELORRIO" to the said Don Blas Otero. In view of the respective file and *Whereas* the first part of your petition involves a question of Civil Law, such as the greater or lesser efficiency of a Sale Contract that the Norwegian Buyers intend to enter into with the Spanish subject Don Blas Otero, His Majesty the King has thought fit to direct that you should be informed: 1st. That this Ministry does not recognise and cannot recognise other owner of the steamer "ELORRIO", and that since her sale has been annulled by the Royal Order of the 14th of April last, the presumed buyers may not dispose of the vessel and 2nd. That the said Royal Order extends to any foreign subject pretending to acquire the steamer in question from the owning Company.

By Royal Commands communicated by the Minister of Foment [*sic*] I inform you of it for your information and consequent effect.

Yours faithfully,  
Madrid, 30th June, 1916.  
The Director General.  
(Signature)

Senor Don Juan L. de Prado, Managing Director of the Compania de Navegacion "La Estrella", Bilbao.

A diagram of the contractual relations



shows that, according to the Spanish Government's interpretation, the Norwegians could not figure at all, even as cedents of their right of action against the Spaniard, Otero. The Government would have allowed a direct, original sale by the defenders to Otero; but the Norwegians' presence at any stage of the process whereby Otero gained the right to claim delivery of the bill of sale from the defenders and transfer of the ship in the Spanish register infringed the Royal Decree. The interpretations arrived at by the Spanish Government and the Scots court were irreconcilable. The report of the case shows that the Second Division allowed the pursuers a limited proof of the subsale to Otero; his Spanish nationality; the point that the defenders' execution of a bill of sale in favour of Otero would not be prevented by the Royal Decree; and the correctness of the translation of the Decree.<sup>39</sup> It is interesting to discover from the interlocutor sheet among the process papers<sup>40</sup> that on 19 October 1916 the Lords of Session discharged the order for proof, assoilzied the defenders from the conclusions of the action, found no expenses due to or by either party, and decerned. Reasons are, of course, not given.

Within the history of the remedy which we have been tracing in this part of my thesis, *Aurdal* dates from the period<sup>41</sup> before *Behnke*<sup>42</sup> when all ships were special, to lawyers and to sailors, in England and in Scotland. *Sutherland*<sup>43</sup> concerned the earliest stage of the ship's life, a shipbuilding contract; *Aurdal*, a later stage, the sale of a ship already plying the seas. Nothing in Scots law detracts from the proposition that here all ships remain special, even for lawyers. The English attitude has changed: English law since *Behnke*<sup>44</sup> applies to ships the narrow rule outlined by Lord President Dunedin in *Union Electric*;<sup>45</sup> so that a further disapproval of *Union Electric* is provided indirectly by the willingness with which the Second Division in *Aurdal* entertained and strove to advance a suit for specific implement.<sup>46</sup>

This review of the Scots cases on the specific implement of a sale of goods has so far proceeded chronologically. The last two reported decisions will be switched, so that *Mackay v. Campbell*<sup>47</sup> may connect with the discussion arising from *Union Electric*, and *Munro v. Official Liquidator of Balnagown Estates Co.*<sup>48</sup> provide a starting-point for a discussion of the proprietary effects and consequences of a sale under the 1979 Act.

### **Mackay v. Campbell<sup>47</sup>**

In Volume 4 of his *Principles of Scottish Private Law*,<sup>49</sup> Walker states that "specific implement is competent in the case of a contract to sell a specific thing", and in note 94 cites *Sutherland, Purves, Henry*, section 52 of the 1979 Act, and *Mackay v. Campbell*, adding that it is "unlikely to be granted in the case of sale of a generic thing: *Sutherland ... , Davidson ... , Union Electric....*"

*Mackay* concerned an agreement for the sale of two islands, Taransay and Gaskir to the west of the Island of Lewis, with sheep, stock, cattle, buildings, boat, feed, fodder, and implements; £8,000 to be paid for the heritage, and £8,000 for the moveables.<sup>50</sup> During the parties' subsequent dispute over the terms and circumstances of the agreement, the defender pleaded that the moveables were no longer as they were at the signing of the missives.<sup>51</sup> In the Second Division Lord Justice-Clerk Grant treated the dispute on the basis that some moveables no longer existed and that by the amended conclusion the pursuer sought disposition of the heritage alone: "The question of what will ultimately happen in regard to the moveables included in the missives is not raised in the present action."<sup>52</sup> Neither did the House of Lords decide the fate of the moveables, attention being limited to the defender's non-delivery of the disposition. The decision is confined to heritage; but, like that of *Stewart*,<sup>53</sup> also states general principles applicable to the sale of goods.

As *Mackay* concerned a "specific thing such as a landed estate,"<sup>54</sup> Walker's citation is to that extent sound. Neither the Court of Session nor the House of Lords, though, mentioned the further requirement of a *pretium affectionis*. *Pretium affectionis*, in the sense of incalculable sentimental value acquired from long residence on Taransay, was instead put forward by the defender in his objection based on the special hardship which the decree *ad factum praestandum* would cause;<sup>55</sup> but his plea was rejected as hopeless, the Lord Justice-Clerk describing it as a duck lame by the end of counsel's speech and dead by the end of the case.<sup>56</sup>

We were referred to the passage in Gloag on Contract, (2nd ed.) *sub voce* "Disproportion of Interest to Loss Inflicted" at pp. 251-252. The cases there cited, on which the defender relies, are very special and are wholly different on their facts from the present. I need go no further than to refer to Gloag at p. 655, where he cites the classic *dicta* of Lord Watson in *Stewart v. Kennedy*, which, despite any erosion there may have been in other spheres, still express, in this particular aspect, the law of Scotland (in contradistinction to that of England) as it survives today."

The second point of general principle related to pleading. Mackay's amended summons concluded (1) for declarator of Campbell's breach of contract; (2) for decree ordaining implement by delivery of a valid disposition; (3) alternatively, failing such implement within a month of the decree, for authorization of the Clerk of the Court to subscribe on Campbell's behalf the disposition and documents conferring title on Mackay; and (4), alternatively, in the event of the court's repelling Campbell's plea of facility, lesion, and circumvention, but refusing to ordain decree *ad factum praestandum*, for payment of £10,000 with interest.<sup>57</sup> In the original summons, conclusion (4) had been numbered (3) and in its essentials read as follows: "Alternatively, for payment to the pursuers by the defender of the sum of ... £10,000, with interest ..., in the event of the pursuers failing to receive a valid disposition of the ... subjects within the said period."<sup>58</sup>

The Lord Ordinary (Cameron) granted decree for declarator and implement.<sup>59</sup> Campbell offered damages under the third conclusion;<sup>60</sup> but Mackay responded by amending his alternative conclusion for damages to make it *luce clarius* that this conclusion arises only if decree *ad factum praestandum* is refused.<sup>61</sup> In the House of Lords it was held by Lord Guest<sup>62</sup> that

this branch of the case must be approached on the basis of the original alternative conclusion (Third) as unamended. The preliminary argument for the appellant in this House, which was faintly adumbrated before the Division but not sustained, was that upon the minute [consenting to decree in terms of the third conclusion] being lodged the respondent was only entitled to ask for decree in terms of the monetary conclusions of the summons, that the issue between the parties had thereby been determined and that the respondent was not entitled to persist in his conclusion for specific implement of the missives. The action had therefore become incompetent. In my opinion, there is no substance in this argument. In effect the appellant is asking the House to treat the third alternative conclusion (as it then was) as a stark alternative to the second conclusion and to hold that the appellant was entitled to select the alternative and to consent to decree passing, thereby depriving the respondent of his conclusion for implement. Counsel for the appellant agreed that, if the conclusion had read "Alternatively, in the event of the pursuer failing to receive a valid disposition of the subjects, for payment of £10,000", the



argument could not have succeeded. But, reading the pleadings in conjunction with the conclusion, this is precisely what the pursuer was concluding for. Condescence 4 and the plea in law in the form in which we were given to understand it was at that early stage made it clear that the primary conclusion was for implement and that it was only in the event of decree not being granted for implement that there was an alternative conclusion for damages. The Second Division ... correctly repelled the appellant's plea to the competency of the action.

Campbell's counsel in a dispute over heritage had raised a plea based implicitly on the decision in a case involving moveables.<sup>63</sup> The highest court's express rejection of the plea constituted implicit rejection of the decision in *Union Electric*,<sup>63</sup> and endorsement of the ruling by Lord Watson that the election of remedies remains the pursuer's.<sup>54</sup> Together, *Mackay*,<sup>47</sup> *Stewart*,<sup>53</sup> and *McKellar*<sup>64</sup> support the proposition that a summons for specific implement prudently accompanied by a claim for damages failing implement remains a summons for true specific implement.

#### Notes

1. 1916 S.C. 882 (2d Div.).
2. *Id.*, 888 *per* L.J.-C. Scott Dickson.
3. *Id.*, 890 *per* Ld. Dundas.
4. 1881, 9 R. 337.
5. 1890, 17 R. (H.L.) 1, 10-1.
6. 1916 S.C., 890.
7. ANTON, PRIVATE INTERNATIONAL LAW 185-9; MORRIS, THE CONFLICT OF LAWS 265-82; CHESHIRE & NORTH, PRIVATE INTERNATIONAL LAW 447-66; 2 DICEY & MORRIS, CONFLICT OF LAWS 1161-1197.
8. CHESHIRE & NORTH, PRIVATE INTERNATIONAL LAW 791 and n. 15, *Cammell v. Sewell*, 3 H. & N. 617 (1858); 157 E.R. 615; 5 H. & N. 728 (H.L.) (1860); 157 E.R. 1371; and *Winkworth v. Christie Manson and Woods Ltd.* [1980] Ch. 496; ANTON, PRIVATE INTERNATIONAL LAW 405-6, discussing *Todd v. Armour*, 1882, 9 R. 901; MORRIS, THE CONFLICT OF LAWS 351-2; 2 DICEY & MORRIS, CONFLICT OF LAWS 907, 914.
9. 1916 S.C., 887 *per* L.O. (Dewar).
10. *Id.*, 888.
11. *Id.*, 888, 889-90.
12. *Id.*, 888-9, 890-1, 891.
13. 2 DICEY & MORRIS, CONFLICT OF LAWS 915 and n. 11.
14. *Id.*, 916 and n. 18.
15. (1867) L.R. 2 Ch. App. 282, 290.

16. 2 DICEY & MORRIS, CONFLICT OF LAWS 915-6.
17. *Id.*, n. 13: *The Jupiter* [1924] P. 236, 239; *The Cristina* [1938] A.C. 485, 509. *See*, also, *The Zainora* [1916] 2 A.C. 77, 100 (P.C.); *Granfelt v. Lord Advocate*, 1874, 1 R. 782, 793; *The Navemar*, 102 F. 2d 444, 449 (2d Circ. 1939); *Linea Sud Americana Inc. v. 7*, 295.40 tons of linseed, 29 F. Supp 210, 217 (1939). *Cf.*, *The Jupiter* (No. 2) [1927] P. 122, 124. Support for the law of the country of registry, in other words, of the flag, is also to be found in SINGH, SHIPOWNERS 82-3; 2 JOUBERT, THE LAW OF SOUTH AFRICA para. 559 and n. 3 (p. 357); and even in *Aurdal's* circumstances, from the old-fashioned rule that moveables conform to the domicile of their owner: ANTON, PRIVATE INTERNATIONAL LAW 400-1; MORRIS, THE CONFLICT OF LAWS 350; 2 JOUBERT, THE LAW OF SOUTH AFRICA para. 553 and n. 1 (p. 352); CHESHIRE & NORTH, PRIVATE INTERNATIONAL LAW 788-9; 2 DICEY & MORRIS, CONFLICT OF LAWS 943.
18. 2 DICEY & MORRIS, CONFLICT OF LAWS 915 n. 14, citing, *e.g.*, Merchant Shipping Act 1894, s. 13; Wills Act 1963, s 2(1)(a).
19. 2 DICEY & MORRIS, CONFLICT OF LAWS 916 n. 15, citing Trustees Executors and Agency Co. Ltd. v. I.R.C. [1973] Ch. 254, 263. *See*, also, *The Christopher*, 2 C. Rob. 209 (1799) (condemnation in prize); *The Syredo*, 1 Spinks Eccl. & Adm. 36 (1853); *Hooper v. Gumm*, *supra* n. 15; *Liverpool Marine Credit Co. v. Hunter* (1868) L.R. 3 Ch. App. 479; *Castrique v. Imrie* (1870) L.R. 4 H.L. 414; *The Odessa* [1916] 1 A.C. 145, 153-4 (condemnation in prize). *Cf.* *Simpson v. Fogo*, 1 H. & M. 195 (1863); 71 E.R. 85; *The Cristina*, *supra* note 17, 509; *Lorentzen v. Lydden & Co. Ltd.* [1942] 2 K.B. 202.
20. 2 DICEY & MORRIS, CONFLICT OF LAWS 916 n. 16, citing *Government of the Republic of Spain v. National Bank of Scotland* 1939 S.C. 413; *Laane and Baltser v. Estonian State Cargo and Passenger Line* [1949] 2 D.L.R. 641. *Cf.* *The Cristina*, *supra* note 17, 509.
21. 1916 S.C., 886.
22. *Id.*, 885-6.
23. Deriving from the leading case, *British South Africa Co. v. Companhia de Mocambique* [1893] A.C. 602, confirmed in *Hesperides Hotels Ltd. v. Muftizade* [1979] A.C. 508.
24. Sched. 1, Art. 16.
25. SPRY, EQUITABLE REMEDIES 44; JONES & GOODHART, SPECIFIC PERFORMANCE 107; MORRIS, THE CONFLICT OF LAWS 337-9; CHESHIRE & NORTH, PRIVATE INTERNATIONAL LAW 255-7; 2 DICEY & MORRIS, CONFLICT OF LAWS 923, 926-8. *Cf.*, ERSK. 3.7.49.; ANTON, PRIVATE INTERNATIONAL LAW 399.
26. 1 Ves. Sen. 444 (1750); 27 E.R. 1132.
27. [1908] 1 Ch. 856, 863 *per* Parker J.
28. 2 DICEY & MORRIS, CONFLICT OF LAWS 924; MORRIS, THE CONFLICT OF LAWS 339-42; SPRY, EQUITABLE REMEDIES 45-51; JONES & GOODHART, SPECIFIC PERFORMANCE 107-10; CHESHIRE & NORTH, PRIVATE INTERNATIONAL LAW 257-64.
29. 2 DICEY & MORRIS, CONFLICT OF LAWS 929; SPRY, EQUITABLE REMEDIES 45-6; JONES & GOODHART, SPECIFIC PERFORMANCE 109; CHESHIRE & NORTH, PRIVATE INTERNATIONAL LAW 262.

30. Mont. & Ch. 239, 250 (1840); [1835-42] All E.R. Rep. 415, 417I-418A.
31. 2 DICEY & MORRIS, PRIVATE INTERNATIONAL LAW 930.
32. *See*, pp. 309-11.
33. 10 Hare 254, 259 (1852); 68 E.R. 921, 923.
34. 1916 S.C., 890.
35. *Id.*, 888-9.
36. *Supra* chapter 12, pp. 291-2.
37. 1916 S.C., 889, 890-1, 891.
38. C.S. 252/596/3 of 1917.
39. 1916 S.C., 891, 889.
40. C.S. 252/596/3 of 1917, Interlocutor sheet, p. 6.
41. *Supra* pp. 213, 215-6.
42. *Supra* p. 216.
43. *Supra* pp. 196 *et seq.*
44. *Supra* pp. 217, 219-20.
45. *Supra* pp. 250-1.
46. *See*, esp., the judgment of Ld. Salvesen, 1916 S.C., 891.
47. 1966 S.C. 237 (2d Div.); 1967 S.C. (H.L.) 53.
48. 1949 S.C. 49 (1st Div.).
49. 4 WALKER, PRINCIPLES 282 (3d ed., 1983).
50. Missives of sale: 1966 S.C., 239-40.
51. 1966 S.C., 244-5.
52. *Id.*, 248.
53. 17 R. (H.L.) 1.
54. *Id.*, at 11.
55. 1966 S.C., 242; 1967 S.C. (H.L.), 57.
56. 1966 S.C., 248-9.
57. 1967 S.C. (H.L.), 54.
58. *Id.*, 54 and note.
59. *Id.*, 58, 59-60.
60. 1966 S.C., 244, 247.
61. *Id.*, 247.
62. 1967 S.C. (H.L.), 60.
63. *Union Electric*, *supra* chapter 12.
64. *McKellar*, 1928 S.C. 503.

## Chapter 14: The Passing of Property by Contract: the comparison between Scots Law and French Law

### Munro v. Official Liquidator of the Balnagown Estates Co. Ltd.<sup>1</sup>

Under two contracts the liquidator of the Balnagown and Scotsburn estate had agreed to sell 20,000 cubic feet and 60,000 cubic feet of timber growing thereon to the Ministry of Supply. The two contracts required severance of the timber before Hogmanay 1943 and Hogmanay 1944 respectively, and both permitted extensions of two years. The Ministry then agreed to resell the timber to the pursuer, a timber merchant, removal from the estate to occur by 30 September 1946 and Hogmanay 1946. The merchant then entered upon the estate and felled about 80,000 cubic feet of timber, which the liquidator subsequently forbade him to remove from the estate, averring that removal would be impossible before the relevant contractual periods expired. The merchant argued that he had the right of property in the severed timber, and claimed its delivery from the liquidator and, failing delivery within the court-appointed period, the payment of £6,000 damages. The liquidator pleaded that the merchant lacked property in the timber which could not be removed before the dead-line, so was not entitled to delivery. The merchant sued the liquidator as first defender, and as second defender joined the Lord Advocate representing the Ministry. The second defender did not defend the action and, according to the interlocutor sheet, was eventually assoilzied therefrom.<sup>2</sup> The question of delivery was raised in Procedure Roll.

The Lord Ordinary (Blades) stressed that the timber claimed was cut and no longer *pars soli*. The pursuer argued that the property had passed, "that on severance of the timber the pursuer acquired a right of property in it which was good not only against the seller and his representatives but against all the world and, therefore, good against the first ... defender."<sup>3</sup> The liquidator pleaded *res inter alios acta*.

Passing of property in the timber was to be decided under the Sale of Goods Act 1893. Timber once cut vested in the pursuer, and the contract gave him an implied licence to enter upon the estate and remove what was his. No forfeiture clause in any of the contracts allowed either defender to prevent this removal; instead, failure to remove timber and plant before the dead-line would sound in damages. Delivery should be ordained within a time to be arranged by the parties.

On appeal to the First Division, the reclaiming defender argued that it was "unnecessary to consider the ownership of the timber because the case could be decided on a shorter ground."<sup>4</sup> All four contracts contained clauses about removal, breach of

which prevented the pursuer from claiming either delivery on the contracts or an irrevocable licence to remove cut timber. For passing of property, Bell's *Principles*<sup>5</sup> required severance and complete removal of the cut timber. The 1893 Act was irrelevant. The removal clauses amounted to a forfeiture clause.

The pursuer-respondent averred that his "claim was based, not on contract, but on property. ... Decree of delivery was the normal procedure for asserting a disputed property right and recovering the property in question. ... The defender was liable for the cost of delivery because he was wrongfully withholding the pursuer's property."<sup>6</sup> For passing of property, cases<sup>7</sup> showed that "in the absence of special provision, the test was severance (which made the timber deliverable) and not removal. As regarded remedy, the pursuer, in view of subcontracts, desired delivery and not damages. Unless the defender would permit removal, he must deliver."<sup>6</sup>

The pursuer-respondent's argument was substantially upheld by the First Division. Giving the main judgment, Lord President Cooper decided the pure point of law about the right of property in the timber by first qualifying the Lord Ordinary's reliance on *Jones v. Earl of Tankerville*<sup>8</sup> and then stating the position in Scots and English law as follows:<sup>9</sup>

[U]nder a contract of the type here in question, whereby standing trees are made the subject of an agreement to sell under which the prospective purchaser is authorised himself to enter upon the lands, fell the timber, put it into a deliverable state, and then take it away-- ... under such a contract, in the absence of any contra-indication in the stipulations of the parties, the property in the timber passes from seller to buyer on severance from the ground. Severance transforms the tree into timber. That rule is in harmony with the decision of this Court in ... *Morison v. Lockhart*,<sup>7</sup> and with the subsequent English case (in which *Morison* ... was followed) of *Kursell*.<sup>7</sup> In this instance there are no contra-indications in the agreements. I accordingly conclude that there is no foundation to Mr Clyde's contention that property did not pass at the phase I have indicated.

Clyde's argument for the reclaiming defender stressed not severance but removal beyond the estate boundaries; Bell's phrase<sup>10</sup> to this effect recorded legal history and was "founded upon authorities dating from a time prior to the Mercantile Law Amendment Act, when the law of Scotland on this subject was widely different from what it has since become."<sup>11</sup> It was impossible to infer a forfeiture or irritancy whereby failure to remove cut timber by the dead-line resulted in the pursuer's losing both cut timber and

paid price to the defender.

The effectuation of the decree was hindered by imprecision about the time and place of delivery:<sup>12</sup>

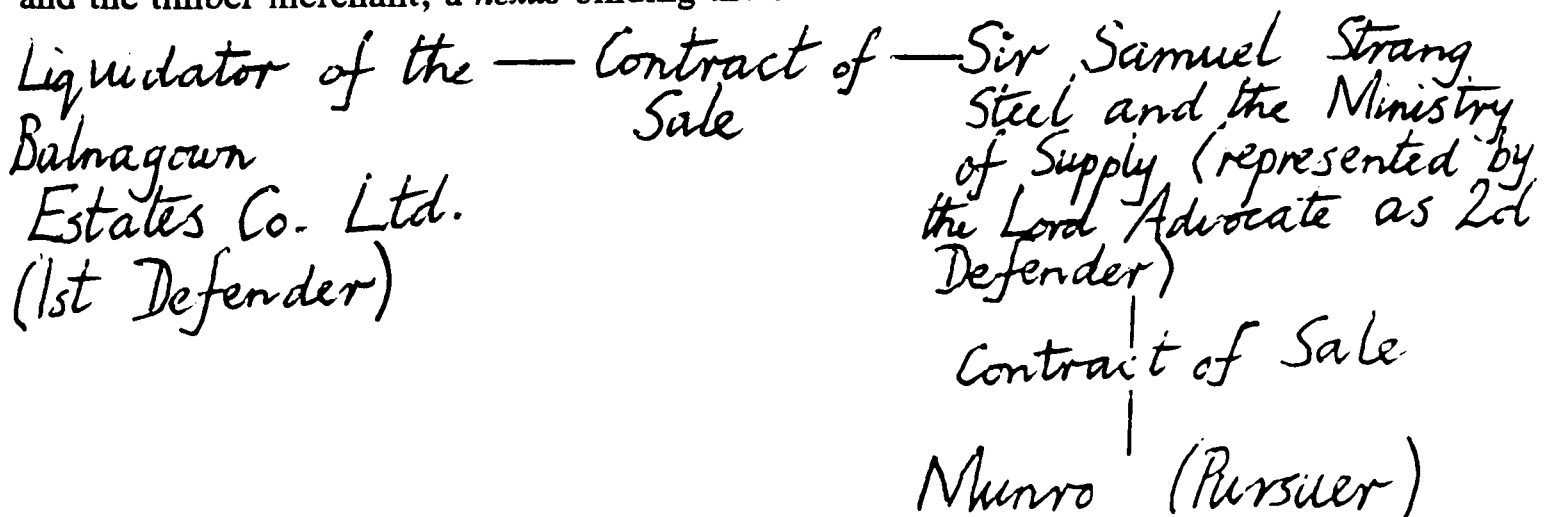
My suggestion, accordingly, is that we should confine ourselves at this stage to making declaratory findings as to the rights of the parties, and that we should then continue the case to enable an effort to be made by the parties to work out their rights. The findings which I suggest should enter our interlocutor are of this type-- (first) that we affirm the proposition that, as from the date of severance, the property in the felled timber passed to the pursuer, and (second) that the pursuer is entitled by one method or another to regain possession of his property which he seeks to vindicate, and that it is either for the defender to allow the pursuer to enter upon the land, on such conditions as may be agreed, for the limited purpose of taking possession of his property and removing it, or alternatively, if the defender so prefers, that he himself should, on such terms as may be agreed, make the timber available to the pursuer at certain points for acceptance by him. In the last resort, if neither of these suggestions proves to be feasible, then the case will have to go back to the Outer House for the purpose of determining in the light of a proof what sum of money must be paid by the defender to the pursuer as the fair equivalent of the pursuer's property which, on the view I take of the law, the defender is wrongfully withholding.

Agreeing with the Lord President,<sup>13</sup> Lord Keith reserved his opinion

as to whether the pursuer is not entitled to decree of delivery in preference to decree for the value of the timber until we have seen what circumstances parties may put before the Court which may relate to the possibility of delivery of this timber. I am not prepared to say that the pursuer is not entitled to delivery of the timber until I know the whole circumstances of the whole case.

With this reservation the Lord President agreed.

A diagram shows the absence of a direct contractual link between the liquidator and the timber merchant, a *nexus* binding the former to deliver the wood to the latter.



Why did the liquidator's plea of *res inter alios acta* fail? The answer lies in the terms arranged by the liquidator and the Ministry of Supply. The second clause in both contracts stated that the "purchase price shall be paid by [Sir Samuel Strang Steel, for the Ministry] or his successors or assignees to [the Official Liquidator of the Balnagown Estates Co., Ltd.] or his successors as Liquidator...."<sup>14</sup> The third clause bound the liquidator to give immediate entry to Sir Samuel, "his workmen and others acting on his behalf."<sup>15</sup> Another clause in each contract stated that the liquidator or any person authorized by him should at all times be entitled to inspect the operations of the Ministry in the cutting and removal of the timber.<sup>16</sup> The combination of these clauses excluded the plea of *res inter alios acta* or *delectus personae*.<sup>17</sup> The subsale and assignation were competent to the Ministry: the contracts, taken together, entitled the merchant to enter upon the estate and fell the trees there.<sup>18</sup>

How could the merchant claim in property rather than in contract, and be described by the Lord President as entitled to regain possession of the property wrongfully withheld by the liquidator? At Scots common law, the *traditionibus* principle required delivery of the *res vendita*. Delivery could be actual or fictitious. There is English authority that the buyer's removing the goods under a licence to do so from the seller is a delivery.<sup>19</sup> "Whether the debtor give the possession of a chattel by delivery with his own hands, or point it out and direct the creditor to take it, or tell him to take away any he pleases for the payment of his debt by the sale of it, the effect, after actual possession by the creditor, is the same."<sup>20</sup> In Roman law, *traditio longa manu* was the fictitious delivery appropriate to massive objects such as columns<sup>21</sup> and timber<sup>22</sup>. At Scots common law, though, this form of fictitious delivery was ruled out by Guthrie's interpretation of *Paul*<sup>10</sup> that timber once felled must also be removed beyond the transferor's estate boundary. Lord President Cooper dismissed Guthrie's interpretation, not as inaccurate but as superseded by the statutory changes in the 1856 Act; changes now reflected in the legislation superseding the 1856 Act,<sup>23</sup> the Sale of Goods Acts 1893 and 1979.

When does property pass under a contract for the sale of standing timber? Lord Blades characterized uncut timber as *pars soli*.<sup>24</sup> Lord President Cooper held that property passed when the trees were severed from the ground; in this respect he interpreted the parties' contract according to their discernible intention expressed in the words "agreement to sell"<sup>25</sup> used in both contracts between the liquidator and the Ministry; his analysis fitted the given facts. But he relied on *Morison* as expounding Scots law: there the First Division, uneasy at the innovations of the 1893 Act,<sup>26</sup>

expressed three different opinions about the nature of a contract for the transfer of timber growing on an estate. Lord Kinnear thought that the contract was not for the transfer and delivery of growing trees but for the sale of wood which might be got out of certain trees when they were cut down, or of the portion of trees severed and turned into corporeal moveables, this contract being coupled with a licence or mandate to enter upon the estate and remove the timber.<sup>27</sup> Lord MacKenzie thought that this type of contract, if validly made, purported to confer a right to cut certain wood growing on the estate.<sup>28</sup> Finally, Lord Johnston thought that if the 1893 Act did apply to this type of contract, and growing timber was "goods", then the contract was not a sale but an agreement to sell; the basis for denying legality to a sale of standing timber was that the goods were not in a deliverable state, "in such state," as sections 62(4) of the 1893 Act and 61(5) of the 1979 Act require, "that the buyer would under the contract be bound to take delivery of them."<sup>29</sup> This sentence, in Gow's opinion,<sup>30</sup> means that

nothing remains to be done on the part of the seller as between him and the buyer, other than (as in the case supposed) allowing the buyer to go on the land and by felling [the trees] to take delivery and make payment of the price (unless it is a ready cash sale) (Williston, *Sales* (1949) s. 264; *Tarling v. Baxter*, 6 B. & C. 360)."

Gow's opinion is preferable to Lord Johnston's. According to *Morison* and *Munro*, a sale of standing timber under the 1979 Act is a legal impossibility, even if the particular trees are pointed out and agreed upon by the contracting parties.

The Court of Session's decision in *Munro*, while yielding a fair result, owed more to adroit eclecticism than to comprehensible consistency. Either the contract does not fall within the purview of the 1979 Act;<sup>31</sup> or it does, but the trees are *pars soli* and so not in a deliverable state.<sup>32</sup> The term *pars soli* brings to mind Lord Shaw of Dunfermline's grumble about the maxim *res ipsa loquitur*: "If that phrase had not been in Latin nobody would have called it a principle."<sup>33</sup> *Pars soli*-- "part of the ground"-- is tautologous with section 61(1) of the 1979 Act: "'goods' includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." But this latinism is then used to limit the full operation of the Act by excluding Gow's interpretation of "deliverable state." Yet when the liquidator in *Munro* objected that *Paul* required the buyer to remove the timber from the estate, the Court of Session resorted to the 1893 Act with the alacrity of a Greek dramatist invoking the *deus ex machina*. Suddenly, *Morison* applied; (yes, but which of the three opinions?). Severance turned trees into



timber: *partes soli*, heritage, into moveables. The 1856 Act applied; (and so, by implication, did its successor, the 1893 Act). Property passed. Removal of the timber beyond the estate boundary was unnecessary. *Paul* was irrelevant. Why, though, should sections 16 to 20 of the 1893 Act have surpassed section 62(4) in their relevance to timber?

Delivery, we assume, took place in *Munro*. On this ground the Lord President's words about the merchant's regaining possession are explicable. But the Lord President followed *Morison*, in which Lord Kinnear had held: "I do not doubt that, in the cases to which the clause making a contract equivalent to a transfer of property properly applies, the purchaser does obtain a real right in this sense, he acquires a right not only against the seller and his representatives but against all the world."<sup>34</sup> Does ownership now pass under a sale governed by the 1893 and 1979 Acts, without the need for delivery?

The notion that property may pass by contract alone is ancient, and, in modern law, widespread. Suß<sup>35</sup> mentioned that Babylonian, Hellenistic, Hindu, Islamic, and Judaic law did not require *traditio*. In 1952 he observed that the principle of transfer of property by contract (*das Vertragsprinzip*) had been adopted by France, Italy, Rumania, Portugal, Canada, England, the United States, Japan, and Russia.<sup>36</sup> He declared:<sup>37</sup>

Mann kann also wohl sagen, daß der größere Teil der Erde auf die Tradition verzichtete, und zwar gerade Gebiete wie England und Amerika, die einen besonders lebhaften und hochentwickelten Handel haben. Nie aber ist aus all diesen Ländern die geringste Klage über das Vertragsprinzip gekommen. Offenbar hat es allen praktischen Anforderungen entsprochen. Wer also glaubt, ohne die Tradition nicht auskommen zu können, der halte sich diesen Umstand als zwingenden Gegenbeweis vor Augen.

In testing the relevance of this triumphal affirmation to the 1979 Act, we start by referring to the legal system which offers interesting comparisons with British law on the passing of property under a sale of goods: the law of France.<sup>38</sup>

### French Law

The *Code civil* reveals an inner tension between the idealism of the eighteenth century and the scepticism which from feudal times until the present has led merchants and creditors to concentrate on the reality of possession rather more than on the abstraction of ownership. The history of this tension is as follows.<sup>39</sup>

In Old French law the brocard *res mobilis, res vilis* epitomized the subordination

of moveables-- transient, consumable, scarcely conceived as individual and absolute<sup>40</sup>-- to the permanent unit and index of wealth and social position, land. Barbarian law had confined the owner of a moveable to an action against his bailee who, appearing in third parties' eyes to be the owner through law-abiding, undisturbed possession, subsequently betrayed his trust by alienating, not restoring, the goods.<sup>41</sup> Thieves or finders, by contrast, might be hunted down and dispossessed by the owner.<sup>42</sup> In the feudal period from the tenth to the fourteenth centuries, customs varied between the Germanic gibe,<sup>43</sup> *Hand muss Hand wahren*, and the Roman *rei vindicatio*;<sup>44</sup> predominant was the gibe, which in its implications continued to distinguish between the owner's voluntary and involuntary partings with possession.<sup>45</sup> Retrieval of lost or stolen goods was moderated by some southern customs that purchasers in markets or fairs could demand reimbursement of the price from the vindicating owner; the exception preserved revenues to the lords and communities superintending these occasions.<sup>46</sup> Predominance shifted from gibe to *rei vindicatio* during the reception of Roman law in the fourteenth and fifteenth centuries, though the prior limitation on vindication now applied to mortgages, *usucapio*, and possessory actions.<sup>47</sup> The shift did not endure: supremacy of *rei vindicatio* coincided with growth in commerce and the number of goods which, in Dumoulin's words, could pass through a hundred hands in an hour;<sup>48</sup> thirty-year prescription-periods of *rei vindicatio* would discourage purchasers and increase the number of actions creating evidentiary difficulties of identification.<sup>49</sup> Practice preferred *bona fide* purchasers to imprudent owners: Pothier's *Commentary on the Customs of Orleans* guarded possessors of moveables with a rebuttable presumption of ownership which, by immediate attribution of ownership, dispensed with *usucapio* and substituted possession for title in goods the purchase of which seldom happened in writing. Hence the *Châtelet* in Paris evolved the sneer<sup>50</sup> which in Bourjon's epigram<sup>51</sup> became the first paragraph of article 2279 *Code civil*: "En fait de meubles, la possession vaut titre."<sup>52</sup> This protected sceptical creditors and third parties.

The contrary idealism is the philosophical extension of a process originating in the *traditio ficta* of Roman law. One such form, Celsus's *constitutum possessorium*, was habitually employed in land conveyances by French notaries who inserted the *dessaisine-saisine* clause mendaciously affirming the occurrence of *traditio*.<sup>53</sup> The insertion was "équipolle à tradition et délivrance de possession":<sup>54</sup> the clause should be implied if not mentioned in the conveyance.<sup>55</sup> These were heady times: against the conservatism of Pothier, who reiterated the necessity of tradition, the adherents of the theory of natural law raised up the right of property as an abstraction from its referent,

transmissible by the will of the contracting parties alone.<sup>56</sup> "De venditione et emptione notandum," declared Grotius in *De Jure Belli ac Pacis* 2.2.15.<sup>57</sup> "etiam sine traditione, ipso contractus momento transferri dominium posse, atque id esse simplicissimum." Intellectual bravura dignified notarial format. The draftsmen of the *Code civil*, chivvied by Napoleon,<sup>58</sup> tried to codify theory and practice;<sup>59</sup> the clearest statement of their intentions came from Bigot de Préameneu, that "il n'est donc pas besoin de tradition réelle pour que le créancier doive être considéré comme propriétaire. ... Ce n'est plus alors un simple droit à la chose qu'a le créancier, c'est un droit de propriété, jus in re."<sup>60</sup>

Having described the background, we split the codification into three topics: the transfer of property in moveables; the protection of strangers to the contract; and the means of safeguarding the right of the owner who has yet to receive delivery of the goods from the seller in possession.

### 1. The transfer of property in moveables

Property "est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements";<sup>61</sup> it is "le droit réel par excellence."<sup>62</sup> It may be transmitted and acquired by agreement.<sup>63</sup> Sale, reads article 1583, "est parfaite entre les parties, et la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé."<sup>64</sup> Transfer of property between the parties does not depend on delivery of possession. Article 1138 states: "L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. Elle rend le créancier propriétaire...."; a pair of paragraphs explained by Ripert and Boulanger as follows:<sup>65</sup>

Ordinairement on emploie le mot "parfait", à propos des contrats, pour indiquer qu'ils sont *définitivement consentis*.... Mais ici les auteurs du Code ont eu une autre idée; ils ont entendu exprimer que *tout l'effet utile de la vente est obtenu*.... C'est de cette manière ... qu'ils ont lié deux choses qui jusque-là étaient demeurées distinctes: la *création* par contrat de l'*obligation* de livrer et l'*exécution* du transfert. ... L'art. 1138 réunit les deux termes de créancier et de propriétaire qui sont antinomiques et souligne ainsi l'effet transitif du contrat: le créancier de la livraison de la chose devient, par le contrat, propriétaire de la chose.

## 2. The protection of strangers to the contract

Sceptics of this eighteenth-century idealism quickly point to the first paragraph of article 2279<sup>52</sup> and to its sister, article 1141:

Si la chose qu'on s'est obligé de donner ou de livrer à deux personnes successivement, est purement mobilière, celle des deux qui en été mise en possession réelle est préférée et en demeure propriétaire, encore que son titre soit postérieur en date, pourvu toutefois que la possession soit de bonne foi.

By divesting the owner, these articles protect two classes of persons: third-party creditors unaware of the contracting parties' sale;<sup>66</sup> and subsequent acquirers from a buyer whose contract with his seller is null.<sup>67</sup> Passing of property is "causal" in French law<sup>68</sup> rather than "abstract" as in German<sup>69</sup> and South African law,<sup>70</sup> so annulment of the contract automatically revests the property in the seller, who, but for articles 2279 and 1141, could then trace the goods down the chain of acquisition. Articles 2279 and 1141 therefore scotch<sup>71</sup> the right of revendication held by the purchasing proprietor still to receive delivery.

Yet they do not kill it. The second paragraph of article 2279 substantially restates feudal law<sup>45</sup> on lost and stolen goods:

Néanmoins celui qui a perdu ou auquel il a été volé une chose peut la revendiquer pendant trois ans, à compter du jour de la perte ou de vol, contre celui dans les mains duquel il la trouve; sauf à celui-ci son recours contre celui duquel il la tient.

And article 2280 maintains the repute of markets<sup>46</sup> by entitling the actual possessor of stolen or lost property bought there to reimbursement of the paid price from the original proprietor.

Divestment of the original owner is effected by the combination of three requirements: actual possession, in good faith, of a moveable not exempt from the application of articles 2279 and 2280.<sup>72</sup> Once effected, divestment is complete; the acquirer gains a fresh title.<sup>73</sup> Our discussion of the owner's right of vindicating a property right against the seller need travel no further than the first requirement: actual possession. Provided the goods are specific and owned by the seller at the time of agreement, and transfer of property has not been contractually delayed by the parties,<sup>74</sup> property passes under articles 1583 and 1183. The buyer, acquiring title, becomes owner; the seller becomes detentor for the account of the owner-buyer.<sup>75</sup> Though

critical of the French transfer *solo consensu*,<sup>76</sup> Dekkers concedes the competency of revendication against a detentor,<sup>77</sup> who is therefore not protected as such by article 2279 but only by the presumption that he is a possessor.<sup>78</sup> Dekkers refers to article 2230: "On est toujours présumé posséder pour soi, et à titre de propriétaire, s'il n'est prouvé qu'on a commencé à posséder pour un autre." The protasis is activated when the purchaser shows a valid sale passing property.

### 3. The protection of the buyer who has yet to receive possession

The buyer, having acquired rights of property and so of revendication which do not infringe the protected interests of third parties, then wonders how to safeguard the working out of his rights from his seller's possible flightiness or obstinacy, and how to forestall the operation of articles 2279 and 1141. Here we encounter Bartolus's medieval rationalization<sup>79</sup> designed to overcome the apparent disapproval of specific performance in Justinian's *Digest*: obligations *dare* could be directly enforced, obligations *facere* could not be so enforced but on breach resolved themselves into damages, since *nemo potest praecise cogi ad factum*. Old French law allowed direct enforcement of an obligation to transfer a specific asset: the form of execution was seizure of the available asset.<sup>80</sup> Bartolus's distinction was repeated by the jurist whom Dawson casts as the villain preventing original, consistent analysis of the problems of specific performance in France-- Pothier.<sup>81</sup>

The only difficulty that Pothier felt was over the question whether a seller or lessor could be compelled to perform by direct execution against specific property sold or leased, without violating the "rule" that *nemo potest*. ... But he concluded that this "rule" (also called a "maxim of law") was not violated by direct execution and that the use of force to deprive an owner of specific property was not "uncivil." He defined the problem as one merely of construing the meaning of *nemo potest*, which he treated as a binding rule. Only in one place, among several where he discussed it, did he even attempt an explanation of *nemo* itself, and this indirectly, when he said that *nemo* applied to "a bodily act by the debtor's person, to which he could not be constrained without outrage to his person and his liberty."<sup>82</sup> He drew no other distinction between types or classes, between obligations that were hard to enforce and those that were not. Above all he misrepresented the practice of his own time.

Pothier's work, fluent, admired, was balm to Napoleon's draftsmen.<sup>83</sup> *Nemo potest* suited libertarian ideas of the day and fettered the power of the judicial oligarchy, whose

members were mistrusted for the nepotism and authoritarianism which had spoilt the *Ancien Régime*.<sup>84</sup> So the Bartolus-Pothier distinction appeared in article 1126, "Tout contrat a pour objet une chose qu'une partie s'oblige à donner, ou qu'une partie s'oblige à faire ou à ne pas faire"; and the consequence of breach, in article 1142, "Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en cas d'inexécution de la part du débiteur." Obligations *de donner* are fulfilled immediately on the conclusion of the contract in which the passing of property in a specific thing owned by the seller is not contractually deferred.<sup>85</sup> But the new owner, the buyer, wants delivery of possession; and delivery is an obligation *de faire*, which by article 1142 resolves into damages upon the debtor's refusal to perform. The practical interpretation of article 1142, however, serves to warn scholars of comparative law against facile assumption that all foreign laws mean what they say. As Marty and Raynaud have explained,<sup>86</sup> the scope of the *nemo potest* rule

ne saurait être exagérée; elle signifie seulement que l'obligation de faire ou de ne pas faire s'exécute par équivalent, dans le cas où une contrainte directe sur le débiteur est physiquement ou moralement impossible, et il y a des circonstances où une telle contrainte serait impraticable ou odieuse, à raison de l'atteinte abusive qu'elle porterait à la liberté du débiteur. Le principe demeure que l'exécution en nature doit être poursuivie chaque fois qu'elle est possible car c'est la seule exécution pleinement satisfaisante pour le créancier.

An obligation *de donner* bound up with a subsidiary obligation *de faire* in the sense of handing over a specific object is therefore specifically enforceable when delivery is possible.<sup>87</sup> The debtor's liberty is not infringed, for the judicial decree is executed by the sheriff's direct removal of the goods from the seller's possession.<sup>88</sup> (Reasonableness of physical intervention may conceivably raise difficulties: if, for example, the ear-rings subject to execution *manu militari* are being worn by the seller, one hardly imagines the sheriff being allowed to rip them from her ear-lobes.) The plaintiff does not have to show the court that the goods are unique or specially valuable.<sup>89</sup>

Having placed the defaulting seller *in mora* (*mise en demeure*),<sup>90</sup> the buyer may proceed to the full-blown *action en revendication*, a petitory real action for restoration of physical possession;<sup>91</sup> or may launch the *saisie-revendication* as a quicker preliminary bar to the disposal of the goods by the seller in possession. This conservatory attachment in revendication is usually employed<sup>92</sup> and has not been eclipsed by the *saisie-conservatoire* introduced in 1955 and limited to actions about claims for money sums.<sup>93</sup> Despite texts hinting that *saisie-revendication* is competent against a third-party

detentor but not against the debtor personally obliged to the seizing creditor,<sup>94</sup> it is submitted that, as the articles in the *Code de procédure civile* which cover *saisie-revendication* do not impose this restriction,<sup>95</sup> the better view is that this *saisie* is competent to the buyer vindicating the property right transferred to him under the sale and the provisions of the *Code civil*.<sup>96</sup>

The seisor must petition for an *ordonnance* of *saisie-revendication* from the president of the *tribunal de grande instance*<sup>97</sup> or, if the cause of action does not exceed 1000 Fr., the *juge d'instance*.<sup>98</sup> The petition must summarize the effects of the *saisie-revendication*,<sup>99</sup> the causes of seizure and the objects revendicated. Territorial jurisdiction is exercised by the court of the place of seizure.<sup>100</sup> The *ordonnance* may be granted on a legal holiday,<sup>101</sup> as a matter of urgency, to prevent the disappearance of the moveable.<sup>102</sup> *Saisie-revendication* exercised without *ordonnance* is null<sup>102</sup> and renders both seisor and sheriff liable in damages to the seizee (*saisi*).<sup>97</sup>

Under article 830 *Code de procédure civile*, *saisie-revendication* follows the same general procedure as *saisie-exécution*. The sheriff presents himself at the doors of the seizee's home.<sup>102</sup> If they are open, then, without issuing a demand to pay (*itératif commandement*) which is not applicable here, the sheriff begins his levy (*procès-verbal*) by listing the attached objects found in the seizee's possession. He then constitutes a *gardien*, who in *saisie-revendication* may be the seizee himself,<sup>103</sup> and remits a notification of the seizure to the seizee.<sup>104</sup>

If the seizee refuses the sheriff entry or opposes the *saisie-revendication*, then, in contrast to the procedure in *saisie-exécution*, the procedure is that the sheriff may not force the doors but must refer the case to a *juge de référés*,<sup>105</sup> or, if the *ordonnance* was granted by the *juge d'instance*, to him.<sup>106</sup> During this interruption of the *saisie*, the sheriff may post a keeper at the doors (*garnison aux portes*), to prevent removal of the attached objects.<sup>107</sup> If the *juge de référés* or *d'instance* so rules, the *saisie* continues by the sheriff's forcibly entering the seizee's home. Forcible entry without authority does not nullify the *saisie* but attracts administrative penalties and damages in the seizee's favour.<sup>107</sup> If the goods have already been seized by another, the seisor intervenes by a *demande en distraction*.<sup>108</sup>

*Saisie-revendication* is an interim step which must be confirmed by the seisor's *demande en validité* upholding his *droit de suite*.<sup>109</sup> Territorial jurisdiction is exercised by the court of the seizee's domicile.<sup>110</sup> If the *saisie* is validated, the judgment constitutes the vindicating seisor's right and ordains restitution of the moveables to him, with the effect of an *action en revendication*.<sup>111</sup> "Le jugement qui ordonne la mise en

possession de l'acheteur, équivaut à délivrance, non seulement à l'égard du vendeur, mais"-- most important-- "encore à l'égard des tiers."<sup>112</sup> The debtor-seizee may, of course, wilfully exercise his power to dispose of the attached goods, so that articles 2279 and 1141 would operate: the weakness of the *saisie* is revealed where the clever seizee, by allowing the sheriff to execute the *procès-verbal*, gives him no cause to post a keeper whose presence outside the seizee's home might arouse the suspicions of a *bona fide* second purchaser coming to take delivery of the goods. Yet the attachment does strengthen the chances of the proprietor-buyer's excluding the operation of the dreaded articles, for the seizee who disposes of the attached goods commits the criminal offence of *détournement* punishable by article 400-3 *Code pénal* if he was *gardien* and by article 400-4 if he was not. The *mala fide* purchaser from him is liable as an accomplice.

### Comparison: Scots law

Having surveyed French arrangements for the passing of property, we follow a similar order of treatment<sup>113</sup> and discuss three topics: the passing of property under the 1979 Act; the protection of strangers unaware of the conclusion of the contract; and the protection of the right to revendication by the new owner who has yet to receive possession of the goods from the seller.

#### 1. The passing of property under the Sale of Goods Act 1979

The first major difference between the *Code civil* and the 1979 Act is the lack of a detailed definition of "property" in the British statute. Section 61(1) defines it as "the general property in goods and not merely a special property." "The general property" and "a special property" are English legalisms; Scots law acknowledges no "special property";<sup>114</sup> so this definition by way of contrast is only explicable by English authority. The general property, said Coke,<sup>115</sup> is the right which every owner has. An example of a special property is the pledgee's right in the pledge, though "special interest" is the expression now preferred:<sup>116</sup>

The very expression "special property" seems to exclude the notion of that general property which is the badge of ownership. If the pledgee sells he does so by virtue of and to the extent of the pledgor's ownership, and not with a new title of his own.

Profits from the sale of the pledge defray the secured debt, any surplus goes to the pledgor as owner, and the pledgee "cannot use the goods as his own."<sup>117</sup> The difference



between the articles-- definite and indefinite-- in the section 61(1) is important: "A' property passes ... by a pledge but not 'the' property which ... remains in the pledgor."<sup>118</sup> So the definition reinforces the exclusion by section 62(4) of any transaction, formally a sale, which is intended to operate as a mortgage, pledge, charge, or other security. In English law a security can be created *retenta possessione* by a bill of sale, the exception allowed by section 62(3). In Scots law the interplay between the statutory definition of property,<sup>119</sup> the ban on securities *retenta possessione*,<sup>120</sup> and the rules in the passing of property is important: as *Benjamin's Sale* observes,<sup>121</sup>

it is only under the Sale of Goods Act 1979 that there can be a transfer of ownership without delivery. It is therefore vital for an assignee of goods who has not been given possession to show that there has been a genuine sale, governed by the Act, and not a transaction caught by section 62(4) which would be ineffective under Scots common law.

Besides this contrast between "the general property" and "a special property," a study of the background to the 1893 Act throws further light on the meaning of "property." In a Scots appeal to the House of Lords, *McBain v. Wallace*,<sup>122</sup> Lord Blackburn explained the difference between English and Scots common law as follows:

By the English law when there was what civilians would call *emptio perfecta*, and what English lawyers would call a bargain and sale,-- a contract for good and valuable consideration to pass the property in particular chattels,-- as soon as that was ascertained-- the property did pass, and the purchaser, although he might not be entitled to delivery-- for there might be a vendor's lien or something else to prevent delivery-- was entitled nevertheless to the property in the goods, to the *jus in re* as well as to the *jus ad rem*. That made a very considerable practical difference between the law of England and the law of Scotland, for the law of Scotland was like the civil law upon which it was founded, the maxim of the civil law being *traditionibus et usucapionibus non nudis pactis transferuntur rerum dominia*. When there was not an actual delivery, however complete the contract might be,-- although it was *emptio perfecta* to the fullest extent ..., and although every farthing of the price was paid,-- yet the *dominium rei*, the *jus in re*, did not pass to the purchaser. Although he had the *jus ad rem* and could, so long as the vendor was *sui juris*, compel the vendor to deliver to him the goods, he had not the *jus in re*.

Under the English law of bankruptcy, the trustee, unlike his Scots counterpart, could not touch goods sold but undelivered at the time of bankruptcy. Lord Blackburn then expounded section 1 of the 1856 Act,<sup>123</sup> which

does not say that a contract of sale,-- *emptio perfecta*,-- in Scotland shall pass the property,-- shall pass the *jus in re*-- and so far does not assimilate it to the English law at all. The chief practical difference arising from the *jus in re* remaining in the vendor and the *jus ad rem* going to the purchaser was that the vendor's creditors by poinding and by sequestration could take the goods. There is a nominal difference still between the law of England and the law of Scotland, but for all practical purposes the law of Scotland, where there has been a contract of sale, though no delivery, is made identical with the law of England in the actual result.

Scots law has moved on since 1881. The *ius ad rem* specially protected by section 1 of the 1856 Act was stripped of its protection when that section was repealed by the Schedule of the 1893 Act. English common law was, with a few variations, applied to Scotland. Assimilation occurred, nominally and practically. Lord Blackburn's analysis of English common law describes Scots law of the sale of corporeal moveables in 1989. So the right of property which the buyer acquires under sections 16 to 20 of the 1979 Act must stand or fall, no longer as a specially-protected *ius ad rem*, but as a real right, a *ius in re*. Upon the seller's bankruptcy<sup>124</sup> the buyer can successfully demand, not just a dividend in lieu of delivery of the goods, but the delivery of the goods themselves, and, having paid the full price, he may keep the goods, unlike secured creditors, who must sell their securities and refund any surplus to the seller's trustee. That the buyer keeps the actual goods and outranks secured, preferred, and ordinary creditors suggests that the goods sold yet not delivered on the seller's bankruptcy do not fall into the bankrupt's estate.<sup>125</sup> This exemption from the bankruptcy statutes tends to confirm the impressions stated by two Scots lawyers shortly after the 1893 Act applied to Scotland, that ownership could now pass by force of agreement, by the contract alone. Christie<sup>126</sup> inferred that, since the disappearance of the "anomalous right" created by section 1 of the 1856 Act, "something between a *jus in re* and an ordinary *jus ad rem*, which came to be known as a *jus ad rem specificam*", the buyer under the 1893 Act was even better placed to vindicate his right as against the seller's other creditors. Subject to retention rights under the Act or common law, the seller's general creditors now faced the buyer as proprietor of the goods, enjoying a true *ius in re* instead of the former *ius ad rem specificam*. And R. Brown, an adviser to Chalmers on the extension of the Sale of Goods Bill to Scotland, declared:<sup>127</sup>

In the case of a sale of specific moveables the principles of the law of Scotland ... have been entirely subverted by the importation ... of the English principle of the property being passed by the contract of sale without necessarily waiting for delivery, but the old law of Scotland still holds in

regard to other kinds of property, and in regard to any other contract than sale.

Earlier in his preface he had explained that he used the term "ownership" as "less ambiguous than the English term 'general property.' ... In England the 'general' or 'absolute' property in goods means ownership...."<sup>128</sup> If critics of the idea that ownership passes by the sale are correct, then it is extraordinary that the 1893 Act did not have the effect on Scots law that the Scots adviser to the draftsman thought it had.

When property passes to the buyer under the sale, he acquires a right which ousts the bankrupt seller's trustee and carries other implications.<sup>129</sup> In the full story of the sale, though, the right of property is not much use, for the buyer who has not yet paid or taken delivery faces a barrage of contractual defences availing to and proprietary rights vested in the seller, as well as a power, legally or even illegally, to divest the buyer of ownership. Yet disabilities need not destroy the buyer's right; the subsequent history of the contract is of their removal. Ownership passing by the contract remains-- almost invariably-- with the buyer who fulfils his contractual duties. To demonstrate this proposition, let us make seven assumptions:

1. a lawful contract between buyer and seller. This excludes vices of consent and non-age; unlawful contracts preceding the one in question; and disguising of a security *retenta possessione* as a sale.
2. goods specific or ascertained.<sup>130</sup>
3. either an express term that ownership (or property) passes at the making of the contract; or an inference according to sections 17 and 18 that ownership (or property) was intended to pass then. This excludes reservation of title and "Romalpa clauses."<sup>131</sup>
4. payment or tender of the full price; or, if the seller refuses payment or tender, then consignment of the price into a bank account in the joint names of the buyer and seller. "Consignment in case of the absence, lurking, or refusal of the creditor, is equivalent to payment...."<sup>132</sup> Section 27 of the 1979 Act requires that the buyer should pay for the goods and section 28, that he should be ready and willing to do so in exchange for possession of the goods. Though silent about consignment, neither section precludes this form of the buyer's manifesting his preparedness to pay. Payment, tender, or consignment exclude the unpaid seller's defences, rights, and lawful powers against the buyer and the goods;<sup>133</sup> and also exclude the problem of the bankrupt buyer and his creditors.

5. a solvent seller, or a bankrupt seller who has not shown undue preference towards the buyer in the contract made just before bankruptcy.
6. no double sale and delivery of the goods.
7. delivery demanded at the proper place and a reasonable hour.<sup>134</sup>

These assumptions leave us with the problem of the seller in possession who may by section 24 of the 1979 Act confer a good title on another *bona fide* recipient of the goods without notice of the prior sale.

## 2. The protection of strangers to the contract

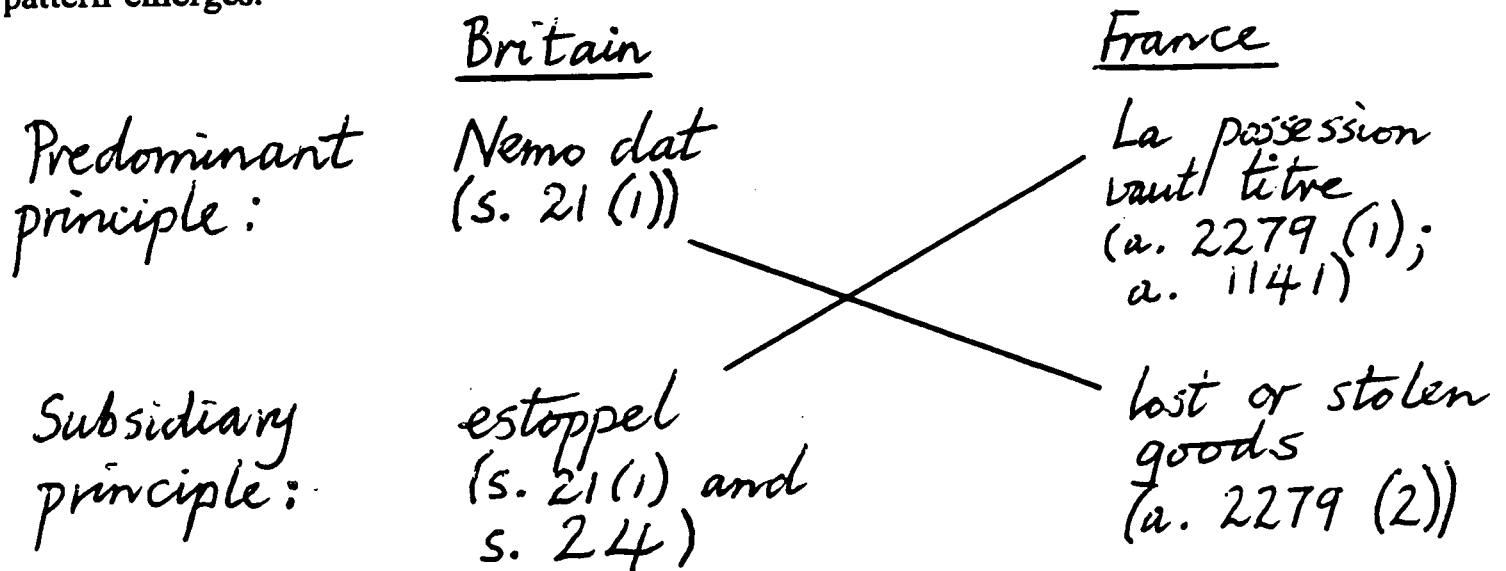
This problem introduces the second stage of the inquiry: the protection of strangers unaware of the contract between buyer and seller. I will not repeat all the arguments over whether or not "property" in sections 16 to 20 is synonymous with "title" in sections 21 to 26;<sup>135</sup> but merely submit that section 24 tends to confirm the synonymity, for the logic of this section demands that "the person having sold goods" and "the owner" must be different persons-- otherwise we are left with a sentence which, in essentials, reads: "Where a person having sold goods continues ... in possession of the goods ..., the delivery ... by that person [the seller] ... of the goods ... under any sale ... has the same effect as if the person making the delivery [the seller] were expressly authorised by the owner [the seller] of the goods to make the same." Such amusing pomposity reduces reflexive verbs to absurdity. Further, if no contracts precede the sale in question, the "person having sold goods" must be the seller, and "the owner of the goods"-- if we reject reflexive absurdity-- must by process of elimination be the purchaser. Yet the seller still possesses the goods. *Traditio longa manu* or *constitutum possessorium* may or may not have occurred. If not, whence derives the buyer's description as "owner of the goods"? The sole answer deducible from the 1979 Act is that he is owner through the operation of a contract governed by sections 16 to 20, which regulate passing of property. So, unless section 24 is to be reduced to absurdity in this example-- a result which Scots are given no permission by the Act to effect<sup>136</sup> -- "property" and "title" pass by the contract, not necessarily by delivery as at Scots common law.

The possibility that *traditio longa manu* or *constitutum possessorium* may have occurred helps to reveal the effect of section 24. In both these forms of fictitious delivery the seller remains in uninterrupted actual possession of the goods which he holds on behalf of the owner-buyer. The Privy Council in *Pacific Motor Auctions Pty. Ltd. v. Motor Credits (Hire Finance) Ltd.*,<sup>137</sup> the New Zealand Supreme Court *in banco* in *Mitchell v. Jones*,<sup>138</sup> and the English Court of Appeal in *Worcester Works Finance*

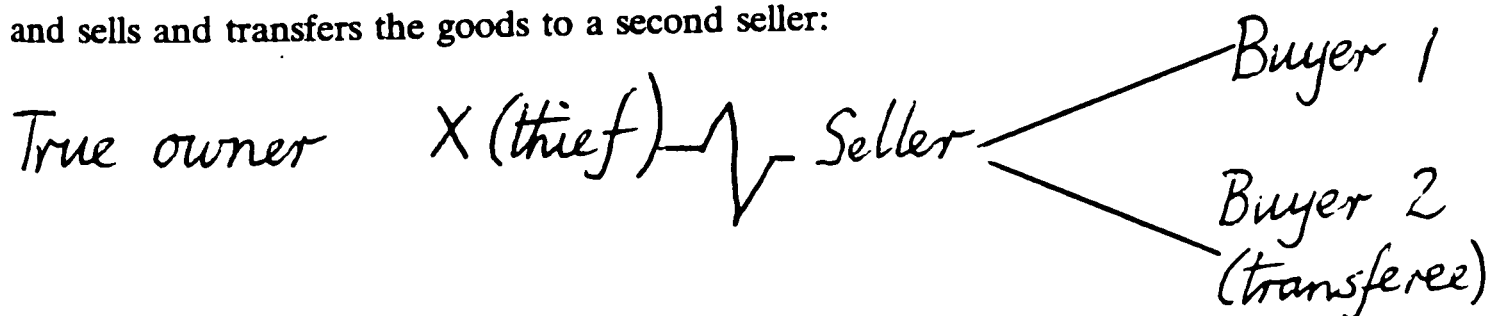
*Ltd. v. Cooden Engineering Co. Ltd.*<sup>139</sup> have held that the words "continues in possession" in section 24 "refer to the continuity of physical possession, regardless of any private transaction between the seller and the first buyer which might alter the legal title under which the possession was held";<sup>140</sup> an interpretation welcomed by Atiyah.<sup>141</sup> So, even if delivery has occurred by *traditio longa manu* or *constitutum possessorium*, the *bona fide* transferee figured by section 24 receives a good title able to defeat the title of a buyer who has nevertheless already satisfied the *traditionibus* principle at Scots common law. Such divestment of an imprudent buyer-owner by a flighty seller in favour of a *bona fide* recipient is the operation of article 1141 *Code civil* in English form;<sup>142</sup> and since article 1141 is a special instance of article 2279 *al.* 1,<sup>143</sup> we conclude that, where section 24 applies, then, at least as regards the first buyer, *En fait de meubles.... En fait de meubles* is the French version of the Latin adage, *res mobilia non habet sequelam*.<sup>144</sup> *Res mobilia* conflicts directly with the notion of the unlimited *dominium* of the Roman law, prevailing against all the world and enforceable against all possessors, *bona* or *mala fide*, according to the maxim, *ubi rem meam invenio, ibi vindico*.<sup>145</sup> The minute one acknowledges that a transferee who has taken delivery by the accepted civilian forms of *traditio longa manu* and *constitutum possessorium* can be divested of his title by the working of legislation like section 24, which prefers a subsequent *bona fide* purchaser, one must abandon dogmatic certainty that *dominium*, ownership, is invariably absolute and invariably avails against all third parties, against all the world. Qualification becomes necessary: *dominium*, ownership, is the chief legal right prevailing against all third parties *who lack a legal justification or defence*. And if Parliament can alter the essential characteristic of the real right, so too can Parliament vary the mode of transfer of that real right by providing that it may pass by consent alone.

Section 24 is an exception to the main principle of section 21(1). Section 21(1) is for the most part a lengthier restatement in English of the Latin principle, *nemo dat quod non habet*,<sup>146</sup> followed by a qualification regarding estoppel, "unless the owner is by his conduct precluded from denying the seller's authority to sell." A variant justification of the divestment under section 24 is that the owner-buyer failing to take actual delivery and interrupt the seller's possession creates in third parties' eyes the impression that the seller is owner with the authority to sell, so that the true owner should be estopped from proceeding against *bona fide* transferees unaware of the prior sale. In the requirement of an interruption of the seller's actual possession there remains a dash of fancy: to rebut the charge of imprudence and obtain the protection of *nemo dat*, the buyer need simply lay his hand on the goods or, if more demonstrative of his

new status, might parade them up and down the street outside the seller's place of delivery, showing amazed passers-by his acquisition, like a child with a new toy, before he then returns the goods to the seller under a fresh contract. This ritual takes seconds, minutes at most, and presupposes an exceptionally attentive audience of surveillant creditors and officious bystanders who, by some vague system of commercial democracy, represent all the world and his wife; indeed, the theory of the transfer of real rights enforceable at once against all the world presumes a ubiquitous immediacy of communication which, Ariel-like, prefigured the "global village" centuries before Marshall McLuhan and Quentin Fiore<sup>147</sup> conceived the idea, and electronic technology began to bring the idea closer to reality. Nevertheless, if section 21(1) is linked with section 24, and article 2270 *al.* 1 *Code civil* with article 1141, the following inverse pattern emerges:



Revendication under article 2279 *al.* 2 *Code civil* is, of course, limited to three years; whereas, if the Scots *rei vindicatio* is truly classifiable as an obligation of restitution, then it prescribes in five years under section 6 and Schedule 1, paragraph 1(b) of the Prescription and Limitation (Scotland) Act 1973. At least the comparison helps to show that at French law goods are not entirely negotiable, and in British law are even less negotiable, so that section 24 should not be read as extinguishing the rights of the true owner of stolen goods if in some link of the chain of acquisition a seller breaches a sale and sells and transfers the goods to a second seller:



In fact, as the chain extends, acquirers may be less and less likely to know about the true ownership of the goods or the theft; but the theory of the true owner's recovery of stolen goods ineluctably casts him as *dominus* and every other natural or juristic person on Earth as a mere possessor. If the seller in possession has conspired with the second buyer, the latter cannot shelter behind section 24; after payment to the fraudulent seller, the first buyer merits the protection of *nemo dat* even though he has never received the goods.

### 3. The protection of the buyer who has yet to receive possession

So we proceed to the third stage of inquiry, the protection given to the owner-buyer who has yet to receive delivery of the goods. Remedies are judicial or extra-judicial; before discussing judicial analogues to the *saisie-revendication* and *action en revendication* of French law, we study the extra-judicial remedy of self-help, which here takes the form of the buyer's recaption or recovery of the goods.<sup>148</sup>

#### (a) Extra-judicial remedies; self-help

Its justification appears in the Eighteenth Report of the Law Reform Committee:<sup>149</sup>

[F]irst, it avoids the trouble and expense of litigation. Secondly, it avoids the delay normally attendant on legal proceedings and thus minimizes the risk of damage to the owner which may occur as the result of the depreciation, loss or destruction of the chattel, or as the result of the extinction of his title by a sale in market overt or under the Hire-Purchase Act 1964 (motor vehicles let on hire-purchase). Thirdly, it enables the owner to recover the chattel itself, which, if the opportunity be lost, he may be unable to trace, and as to which the court may in its discretion refuse an order for specific delivery. Fourthly, it confers upon the owner a more certain remedy than an action for damages, where a judgment in his favour may be wholly or partly unsatisfied.

The legal disadvantages encumbering the English owner are well observed. Apologists for the rule confining specific performance and specific delivery to chattels unique or specially valuable aver that, in the name of economic efficiency, goods should go to the highest bidder, who values acquiring the goods the most, and other aggrieved buyers strewn along the trail of broken promises will be mollified by damages.<sup>150</sup> This is a rich man's vision of the world; English law on specific relief as to ordinary goods encourages contractual breach, a form of lawlessness. Recaption of chattels half admits the failure of the system to intervene by ordering specific delivery in favour of the plaintiff not

content with legal damages; whoever earnestly seeks delivery, once aware of the supineness behind the adequacy of damages rule, may decide against committing his case to the lawyers and resolve to do for himself what the law will not do for him.

Critics of recaption, the Law Reform Committee noted,<sup>149</sup> would argue that the courts, not individuals, should decide property disputes; that recaptors' using force and entering other people's premises tended to encourage breach of that public peace which Blackstone ranked as superior to someone's private property; and that a man's protection from assault and trespass was as important as the recaptor's right of recovery.

Peaceful recaption is generally approved in English law if four requirements are met:<sup>151</sup> the owner acts by a prior right of possession or an immediate right to possession; the possessor's holding is unlawful; the owner has, if necessary, demanded return of the goods; statutory restrictions on recaption do not apply.

Scots law, in Walker's opinion,<sup>152</sup> probably allows peaceable recovery. To the owner the unlawful possessor owes a quasi-contractual duty of restitution. Unlawful taking of goods is *spuilzie*; possession may be defended by force and recovered by fresh pursuit.<sup>153</sup>

Controversy in English law surrounds the questions whether the recaptor may use force against the possessor, or enter premises without the occupier's permission. Whether the buyer seeking to perform his statutory duty of acceptance<sup>154</sup> may enter the premises of the seller refusing delivery is obscure.<sup>155</sup> Clerk and Lindsell<sup>156</sup> rely on *Webb v. Beavan*<sup>157</sup> and *Devoe v. Lang*<sup>158</sup> for the proposition that, by analogy with the bailor's rights against the bailee on termination of the bailment, the buyer wrongfully refused delivery may not enter the seller's premises to fetch the goods, may not use force to recover them, but must sue. Although the violent recaption apparently condoned by *Blades v. Higgs*<sup>159</sup> was disapproved by the New Brunswick Appellate Division in *Devoe*<sup>160</sup> and the Ontario Court of Appeal in *R. v. Doucette*,<sup>161</sup> both courts would have approved peaceable entry to the possessor's premises. In *Devoe*, a damages action for assault and trespass, Hughes J.<sup>162</sup> held that

the owner may make a peaceable entry on the plaintiff's close where the chattel has been deposited if the plaintiff took the chattel from the defendant; also if the plaintiff's possession was originally lawful but has been terminated by a request from the defendant who is entitled to the possession of the chattel. In such cases the defendant may make an entry on the plaintiff's close to retake, but only if such entry can be made peaceably and not by committing a breach of the peace.



And in *Doucette*,<sup>163</sup> Schroeder J.A. held that "if a person enters premises lawfully in the first instance for the purpose of resuming possession of his moveable property and subsequently abuses his authority, he becomes a trespasser." From these statements the buyer seems entitled to take the following steps: if property passes under the 1979 Act, he acquires the immediate right to possession of the goods by paying or tendering the full price. The seller's refusal of delivery infringes sections 27 and 28, so is wrongful. The buyer may notify the seller of his better right to the goods and his intention to collect them from the seller's premises, as required by section 29. The buyer may peaceably enter the seller's premises and take the goods if he can, but may not resort to forcible entrance or removal. If ordered off the premises by the seller, the buyer may not proceed to recover the goods. Nor may he use violence, unless the seller's excessive conduct threatens life and limb, whereupon the buyer may defend himself with appropriate force.

This statement of the English law is compatible with Walker's account of Scots law.<sup>164</sup> The seller's refusal of admission to the premises on which the goods are located does, however, leave the buyer with a problem. S.A.S.-style raids are disallowed; yet the seller may extinguish the buyer's property right by delivering the goods to a *bona fide* recipient unaware of the prior sale.<sup>165</sup> Another form of self-help which the determined first buyer could arrange is a picket outside the place of delivery, with placards declaring the existence of the sale, the buyer's preparedness to pay in full, and the seller's refusal of delivery. Such conduct would embarrass the seller, perhaps attract the attention of the press and television, and help to preclude the operation of section 24, for a second buyer would be more likely to have notice of the existence of the prior sale affecting the goods inside the seller's premises and so could not be *bona fide*. But the first buyer's conduct might be ruled illegal by the courts as a breach of municipal bye-laws prohibiting obstruction of the public thoroughfare<sup>166</sup> or as likely to provoke a breach of the peace, so the buyer must find judicial ways of enforcing his property right. Has Scotland a remedy corresponding to the *saisie-revendication*?

## (b) Judicial remedies

### (i) The Scots conservatory attachment

The analogue is found in section 1 of the Administration of Justice (Scotland) Act 1972:<sup>167</sup>

(1) Without prejudice to the existing powers of the Court of Session and of the sheriff court, those courts shall have power, subject to the provisions of subsection (4) of this section, to order the inspection, photographing, preservation, custody and detention of documents and other property (including, where appropriate, land) which may appear to the court to be property as to which any question may relevantly arise in any existing civil proceedings before that court or in civil proceedings which are likely to be brought, and to order the production and recovery of any such property, the taking of samples thereof and the carrying out of any experiment thereon or therewith. (1A) Without prejudice to the existing powers of the Court of Session and of the sheriff court, those courts shall have power, subject to subsection (4) of this section, to order any person to disclose such information as he has as to the identity of any persons who appear to the court to be persons who--

(a) might be witnesses in any existing civil proceedings before that court or in civil proceedings which are likely to be brought; or

(b) might be defenders in any civil proceedings which appear to the court to be likely to be brought.

(2) Notwithstanding any rule of law or practice to the contrary, the court may exercise the powers mentioned in subsection (1) or (1A) of this section--

(a) where proceedings have been commenced, on the application, at any time after such commencement, of a party to or a minuter in the proceedings, or any other person who appears to the court to have an interest to be joined as such party or minuter;

(b) where proceedings have not been commenced, on the application at any time of a person who appears to the court to be likely to be a party to or a minuter in proceedings which are likely to be brought;

unless there is special reason why the application should not be granted;

(3) The powers conferred on the Court of Session by section 16 of the Administration of Justice (Scotland) Act 1933 to regulate its own procedure and the powers conferred on that court by section 32 of the Sheriff Courts (Scotland) Act 1971 to regulate the procedure of the sheriff court shall include power to regulate and prescribe the procedure to be followed, and the form of any document to be used, in any application under the foregoing provisions of this section in a case where the application is in respect of proceedings which have not been commenced, and such incidental, supplementary and consequential provisions as appear appropriate; and without prejudice to the said generality, the said powers shall include power to provide in such a case for the application to be granted *ex parte*, for the intimation of the application to such persons (if any) as the court thinks fit, and for the finding of caution where appropriate for any loss, damage or expenses which may be incurred as a result of the application.

(4) Nothing in this section shall affect any rule of law or practice relating to the privileges of witnesses and havers, confidentiality of communications and withholding or non-disclosure of information on the grounds of public interest; and section 47 of the Crown Proceedings Act 1947 (recovery of documents in possession of Crown) shall apply in relation to any application under this section in respect of a document or other property as it applied before the commencement of this section to an application for commission

and diligence for the recovery of a document.

As the court has power to order the custody and detention of goods and documents,<sup>168</sup> the operation of section 24 of the 1979 Act could be precluded: the seller in possession, though able to make other contracts, could not transfer or deliver the goods or relevant documents.

The court may order the detention in respect of proceedings current or imminent.<sup>168</sup> It is suggested that the buyer should bring his case to the court's attention by an urgent *ex parte* application for an interim interdict. The application seeks a legal ban on the seller's contracting with or delivering the item to other parties to defeat the pursuing buyer's property right; and the appended application for relief under section 1 of the 1972 Act seeks neutralization of the seller's power of disposal by craving an order for custody or detention of the item in the hands of a neutral third party. Although section 1 of the 1972 Act empowers rather than obliges the court to ordain custody and detention, and the common-law rules for ordaining interdict vest in the court a discretion to refuse the remedy,<sup>169</sup> it is submitted that both interdict and detention should be ordained if the pursuer lawfully demands them: the likelihood that the seller will disobey an interim interdict or unlawfully dispose of the sold goods may seem to the court remote, but, owing to the divestment effected by section 24, the consequences for the buyer's receiving actual delivery are disastrous.

Once the seller refuses to deliver, the buyer's main strategy is to preclude the operation of section 24 of the 1979 Act, pending the outcome of the trial. Speed in the deployment of his resources becomes as important to him as to a military commander. Peaceable demand and attempted recaption of the goods, if unsuccessful because rebuffed, should be followed immediately by the concurrent location of a picket outside the seller's place of delivery, the notification of the press and television, and the launching of an urgent application for interim interdict and an order for detention and custody of the goods under section 1 of the 1972 Act.

An order for custody and detention under section 1 of the 1972 Act does not constitute delivery of the goods or documents to the buyer. Like *saisie-revendication*, the order is conservatory, dependent on the confirmation of the buyer's title to the goods. Consequently, if the seller in possession has sold the same goods more than once and a buyer other than the first successfully claims interim interdict and an order under section 1, the pursuing buyer may encounter at least one other buyer whose purchase from the unscrupulous seller precedes his own.<sup>170</sup> Competition among equally valid, enforceable sales (not agreements to sell, where passing of property is deferred) should

be decided by the maxim *qui prior est tempore, potior est iure*;<sup>171</sup> precedence goes to the date of conclusion of the sale rather than that of applying for interim interdict and an order under section 1, provided that the buyers have paid, tendered, or consigned the full price. If, for example, the seller has sold the property four times over and the third buyer claims interim interdict and an order under section 1, the third buyer's action for revendication is defeated by those of the first and second buyers but defeats that of the fourth. If the first two buyers have not tendered or cannot pay the full price, the third buyer's claim defeats theirs if he pays in full, otherwise his own action is defeated by that of the fourth buyer paying in full, except in the case of a crystallized floating charge which had been created by a company. None of these four buyers need fear a claim by a secured creditor of the seller in possession: the attempt at creating a security *retenta possessione* fails,<sup>172</sup> and the creditor is not in fact secured. If the seller has four times sold goods which he holds as security for their owner's debt to him, then, on the principle of *nemo dat* in section 21(1), that owner's revendication outranks those of all four buyers from the seller in possession, provided that he is not estopped by his conduct.

After being granted the conservatory order under section 1, the buyer proceeds to more time-consuming means of working out his right of property in the goods: two allowed in Scots law are the action of spuilzie and the action of restitution (*rei vindicatio*).

## (ii) Spuilzie

Spuilzie is an unlawful taking of goods,<sup>153</sup> "an unjustified denial of title to possess, whether as owner, hirer, custodier, or other lawful possessor."<sup>173</sup> The action of spuilzie, comparable with the *actio vi bonorum raptorum*,<sup>174</sup> avails the lawful possessor of goods who has been unlawfully dispossessed. The right of physical possession or custody is sufficient title to sue; ownership or any legal title to possess, though sufficient, are not necessary.<sup>175</sup> Erskine<sup>176</sup> wrote that the pursuer need merely show legal possession entitling him to restoration *ante omnia*, the ground of the action being the prohibition on dispossession save by legal order. Walker then goes on to say:<sup>177</sup>

While in modern practice the action of spuilzie *eo nomine* has fallen into disuse, the claim remains competent and has in substance been applied in many modern cases. The essence of the wrong is to do any act in relation to goods which denies the complainer's title to own or possess them. Thus the buyer's right to damages under the Sale of Goods Act 1979, s. 51(1) for damages for non-delivery of goods bought, the property in which has passed

to him, is in essence and origin an action of spuilzie.

Footnote 55 following this passage reads, "Similarly in English law such facts give rise to an action by the buyer in detinue or conversion: see, *e.g.* *Whiteley v. Hilt* [1918] 2 K.B. 808; *Hollins v. Fowler* (1875) L.R. 7 H.L. 757." Yet the buyer suing under section 51(1), not having received delivery of the goods, has never enjoyed actual possession. So, unless "property" in sections 16 to 20 and 61(1) of the 1979 Act includes the right to enjoy indirect or mediate possession<sup>178</sup> through the seller's holding the goods, Erskine's words<sup>176</sup> about the restoration of possession cannot apply. This inference is supported by comparison with South African law. Erskine's phrase "*ante omnia*" echoes the maxim, *spoliatus ante omnia restituendus est*,<sup>179</sup> the motto of the possessory action called the *mandament van spolie*. Yet South African law on the passing of property, since it resembles Scots common law, is different from the English law introduced into Scotland by the 1893 Act, which is the background to Walker's remarks on section 51(1) of the 1979 Act and his comparison with detinue and conversion. Spuilzie can accommodate the English notion of "better right (title) to possess" which is the basis of the detinue action, and so can, like detinue, allow the pursuing buyer a proprietary remedy, a real action, against the seller. Whereas, however, at English law the detinue action lay for return of the goods or payment of their value, the choice remaining the defendant's,<sup>180</sup> the action of spuilzie appears to lie for the return of the goods if possible, and the pursuer may not be fobbed off with damages against his will.<sup>181</sup> One of the defences to the action is the exercise of a right of retention or lien;<sup>182</sup> and the unpaid seller exercising his statutory power of sale under sections 39 and 48(2) of the 1979 Act commits no spuilzie.<sup>183</sup> Again, the action resembles that of detinue, to the extent that the buyer's right to immediate possession depends on payment of the price.

### (iii) Restitution (*rei vindicatio*)

The action of restitution was considered by the Scottish Law Commission to be inappropriate to the buyer's claim for delivery from the seller: "Restitution relates ... to possession of property in the sense of a right *in re*, and we know of no instance in which a buyer whose 'property' is merely 'as between buyer and seller' has endeavoured to assert that such 'property' would justify a competent action based on restitution."<sup>184</sup> The basis of a contrary view is suggested by the words which I have italicized in a passage from Rabel's comparative-law treatise, *Das Recht des Warenkaufs*,<sup>185</sup> among the consequences of the seller's non-delivery of the goods under the 1893 Act and the American Uniform Sales Act 1906, the learned author discusses "Eigentumsansprüche a)

Dinglicher Art":<sup>186</sup>

Wann das Eigentum an der Sache bereits auf den Käufer übergegangen ist, entscheidet die Parteiabsicht, über deren Ermittlung S.G.A. sect. 18 und Unif. S.A. sect. 19 Regeln aufstellen. Danach vollzieht sich der Eigentumsübergang beim Spezieskauf grundsätzlich mit Vertragsabschluß, beim Genus-Versendungskauf mit Aussonderung und Auslieferung an den Beförderer, beim Genus-Fernkauf mit der Übergabe an den Käufer. Hat dieser das Eigentum erhalten, so kann er an Stelle des Schadenersatzanspruchs aus dem obligatorischen Vertrag die Ansprüche des nicht besitzenden Eigentümers gegen den besitzenden Nichteigentümer geltend machen.<sup>187</sup> Auf eine solche dingliche Klage, die sog. *action of detinue*, die im *common law* die Stelle der *rei vindicatio* einnimmt, wird der Beklagte alternativ zur Herausgabe der Sache oder zur Zahlung ihres Wertes verurteilt; in England kann der Kläger jedoch beantragen, daß dem Beklagten untersagt wird, von der Befugnis, den Wert statt die Sache selbst herauszugeben, Gebrauch zu machen (Rules of the Supreme Court, Order 48....<sup>188</sup>

And again, on page 516:

Sofern das Eigentum auf den Käufer bereits übergegangen ist, stehen ihm neben den Ansprüchen aus dem Vertrag die Ansprüche aus dem Eigentum nicht nur gegen Dritte, sondern auch gegen den Verkäufer zu. Im *englischen* Gesetz war dies als selbstverständlich nicht erwähnt; das *amerikanische* Kaufgesetz sect. 66 spricht es ausdrücklich aus. Damit ist dort in einem beschränkten Umfang ein Ersatz für den Erfüllungsanspruch gegeben.

The advantage of the *rei vindicatio* over a claim for specific implement is that the former is a real action for return of what the pursuer already owns, and the court is precluded from exercising a discretion to substitute damages for return of the goods: this substitution would be expropriation, which in the case of moveables is normally confined to the commandeering of property in time of war or national emergency. By the *rei vindicatio* the buyer escapes the limitation which, under English influence, threatens to confine specific implement to goods unique or specially valuable. No reason compels Scots lawyers so to enfeeble their *rei vindicatio*.

"But wait!" a worried civilian may cry, "how can one speak of the return of property which the owner has never actually possessed? Why should a mere contract between the parties justify the *rei vindicatio*?" Upon the simple proposition that a sale of

goods conveys property is piled the paradox that the buyer may raise the *rei vindicatio*. But in *constitutum possessorium*, comprising two contracts (one transferring ownership, the other establishing the transferor's continued detention of the goods on a new ground), the transferee did not receive actual delivery yet was entitled to the *rei vindicatio* for recovering possession of what he had never actually possessed;<sup>189</sup> and, as reference to French<sup>190</sup> and English legal history<sup>191</sup> shows, the passing of property by sale alone is the refinement and standardization of the idea of *constitutum possessorium*, qualified in the 1979 Act by safeguards for the unpaid seller and *bona fide* strangers unaware of the prior sale by the fraudulent seller in possession.

The Scots *rei vindicatio*<sup>192</sup> seldom goes by its own designation,<sup>193</sup> but remains a competent action, as visible in the words which I have italicized in Stair.<sup>194</sup>

Restitution of things belonging to others, may seem to be an effect of property, whence cometh the right of vindication or repetition of any thing; but, *besides the real action*, the proprietor hath to take or recover what is his own, (which doth not directly concern any other person, and so, being no personal right, hath no correspondent obligation upon the haver of that, which is another's, to restore it) there is a personal right, which is a power in the owner to demand it....

The independence of the restitution actions, real and personal, is vital to the question whether the real one, being separate from the personal one mentioned in Schedule 1, paragraph 1(b) of the Prescription and Limitation (Scotland) Act 1973, prescribes in twenty years under section 8 of that statute.

Both real and personal versions demand delivery of the goods and conclude for decree *ad factum praestandum*. Under the heading "Delivery, Actions for," *The Scots Style Book*<sup>195</sup> classifies this action as one *ad factum praestandum*, and in the style of a sheriff-court action for delivery of moveable articles or for payment of their value, includes the condescendence 1 that the enumerated articles "are the property of the pursuer [*narrate the circumstances in which they came into the defender's possession*]."<sup>196</sup> One of the citations<sup>196</sup> in the editorial note is *Henry v. Morrison*,<sup>197</sup> where the solicitor's action to recover the IOUs could not have been for specific implement because the contract between the solicitor and the defender had been cancelled some years before, so was no longer specifically enforceable. The action of specific implement of goods purchased is given at page 63 of *The Scots Style Book*. The two styles are similar. As both are for decree *ad factum praestandum*, the generic action for delivery straddles the divide between property and contract. No procedural dislocation results

from the suggestion that the buyer may revendicate the goods in which the property has passed. The signal difference appears later, at the stage of judgment, when the claim for restitution *in specie*, as a proprietary action, excludes the court's discretion to apply the adequacy of damages rule so long as restitution remains possible. Nor has the court to consider the harsh consequence of imprisonment as a compulsion for specific implement; real actions concern the goods or monetary value as a final substitute for their recovery.

On a balance of probabilities the vindicating pursuer proves a valid sale passing property to him, and shows that he had paid, tendered, or consigned the full price. The evidentiary burden then rests on the seller to explain why delivery should not be ordained; in the absence of a convincing plea that the goods actually belong to a third party, discharge of this burden is difficult, since adequacy of damages is no excuse. Decree of restitution *in specie* is enforceable by the court officer's removing the goods from the judgment debtor's possession and then delivering them into the judgment creditor's possession, so finally excluding the application of section 24 to the goods in the particular case. It is thought that if the seller in possession had sold the same goods several times, and a buyer other than the first had pursued a claim for revendication all the way to successful judgment and delivery, the court would not rescind the judgment if a buyer founding on a prior sale later appeared with a claim for delivery of the goods: section 24 would have operated so as to create a new title in the judgment creditor. Only if decree had been granted but not yet extracted, or delivery had not yet been made (whether by the judgment debtor or the officer authorized by the court), might the court perhaps allow a prior buyer to sist himself as defender, and move to have the action sisted with a view to the raising of an action of multiplepinding. Then, if the prior buyer's claim were approved in the multiplepinding, the court would ordain delivery in his favour.<sup>198</sup>

It is now time to face the sceptics<sup>199</sup> of the idea that ownership, the real right *par excellence*, can pass merely "as between the seller and buyer" under sections 16 to 20 of the Sale of Goods Act 1979 and the similar provisions of the *Code civil*. First, we shall discuss the oddities of the idea that ownership can pass by contract alone; secondly, the oddities of the idea that it cannot; and, finally, we shall attempt a resolution of the difficulties.

(1) At the outset, the right of property which passes under section 16 to 20 is a scrawny creature, transient unless sustained. Before full payment is made or tendered, the buyer lacks an immediate right to possession; the seller enjoys statutory rights, defences, and powers of retention and resale of the goods and of escape from the disappointing sale.



A further oddity is that, as the unpaid seller can pass his own title to another buyer, that title (property) must have reverted from the first buyer to the seller.<sup>200</sup> A possible rationalization is that property under the 1979 Act, as an etherealization at the furthest remove from its referent, the actual goods, can pass by the will of the parties, and can equally be deemed to return when the transferring intention has been disappointed; and that such implicit statutory deeming probably reflects the unpaid seller's thoughts: "I passed him the property when we contracted, but I expected payment; he has not paid; I take back the property and can transfer the idea of property and the actual stuff, the goods, to someone else who will pay me." The transfer of property is perhaps to be described as provisional at the conclusion of the contract; even section 18(1) mentions the instant happening of one event, the passing of the property, but also the future, uncertain occurrence of two more, delivery and payment.

The provisionality of the transfer of property is compatible with the rights of the unpaid seller. The Scottish Law Commission instances the subsequent bankruptcy of both parties as extinguishing the right of the buyer's trustee to call for delivery of the goods.<sup>201</sup> Sir Thomas Smith gives the example of the passing of property in furniture; the solvent seller's carrier then delivers the furniture to the wrong warehouse; the warehousing company, bound contractually neither to the buyer nor to the seller, seeks reimbursement; and the buyer's cheque for the price has now bounced.<sup>202</sup> In yet a third example, if it is the seller who goes bankrupt and the buyer who stays solvent, the buyer's right to delivery of the goods themselves will be extinguished, and he will join the other general creditors in ranking for a dividend, if he does not pay the insolvent's trustee the full price. All three examples combine to show that the mode of transfer under sections 16 to 20 is essentially contractual; and that the mode is only as effective as the contract and the buyer's performance thereunder can make it. The mode of transfer is not delivery (whether actual or fictitious)<sup>203</sup> but comparisons of treatment are relevant. The pre-eminent mode of delivery, *traditio de manu in manum*, is only as good as the actual handing over of the thing, and ineffective to transfer *dominium* if there is a slip 'twixt hand and hand. Yet no rugby player concedes that simply because some passes may be fumbled or intercepted, all passes are futile and rugby players should take up soccer instead. Again, of the forms of fictitious delivery, *constitutum possessorium* divides into one agreement to transfer ownership and another to continue possession in the transferor, though on a different contractual basis: no one believes that just because the parties in a particular case forget to arrange the terms of the second contract, *constitutum possessorium* is never effective as a form of delivery. Nor, by the same

token, should it be contended that, just because some aspect of the sale contract or the buyer's performance is lacking in a particular case, sections 16 to 20 can never be effective to pass ownership to the buyer without the need for delivery.

(2) Some criticize the passing of property *solo consensu* in terms cynical and sweeping. Dekkers declared that "l'effet translatif des contrats n'est qu'un trompe-l'oeil, une simplification plus apparente que réelle....";<sup>204</sup> Ripert and Boulanger, that the change wrought by the *Code civil* was "bien mince et de pur style";<sup>205</sup> Lawson,<sup>206</sup> that

it is very difficult ... to conceive of any practical consequence as flowing from the transfer of property as between seller and buyer other than the passing of risk, with its corollary, the right of the buyer to receive any benefits accruing after the completed sale.

But soon Dekkers concedes that the passing of property entitles the buyer to revendicate stolen or lost goods and those goods exempt from the protection accorded to third parties; and that the buyer is regarded as proprietor by the criminal and fiscal law.<sup>207</sup> In English law, Atiyah, though criticizing some aspects of the idea that property is ownership and passes *solo consensu*, terms Lawson's statement "a slight exaggeration. There are, moreover, signs of some increase in the importance of the passing of property in recent years."<sup>208</sup>

Some French critics aver that, beneath the illusion, *traditio* remains necessary for the transfer of property.<sup>209</sup> Two of the responses to this French argument are equally valid for British law:<sup>210</sup> if *traditio* were still necessary, article 1141 and section 24 would be superfluous, for the seller in possession would not have transferred property (and title) to the first buyer and would pass his own property and title to the second buyer receiving possession; and the creditors of the bankrupt seller would take the undelivered goods, while the purchaser, even if he had previously paid the full price, would rank for a dividend only.

The Scottish Law Commission analyses the property mentioned in sections 16 to 20 as "a hybrid right resembling a *ius ad rem*, but conferring on buyers priority rights in competition with the seller's creditors in the event of the seller's bankruptcy."<sup>211</sup> The Commission complains that it "is not self-evident that the conferring of a priority right on the buyer in preference to the seller's creditors converts a *ius ad rem* into a *ius in re*."<sup>212</sup> But the buyer's right, no longer specially protected by the 1856 Act, must be either personal or real. The Commission's analysis will probably strike the bankrupt seller's creditors as an absurd classification: the 1979 Act does not in terms bestow a

priority on the buyer of the undelivered goods; only real rights defeat the trustee, who himself enjoys a real right as proprietor of the bankrupt estate;<sup>213</sup> and, if the buyer's right is not ownership, and not even a real right, whence derives its real effect against the trustee? Without the justification that "property" means "ownership" in the 1979 Act, the exclusion of the trustee and general creditors lacks theoretical basis and becomes capricious and unfair. Furthermore, the real effect of this hybrid right seems to arise only on the seller's bankruptcy; at Scots common law, creation of real effects against third parties requires some form of delivery (actual or fictitious); no delivery has occurred here; so the real effect of this personal right appears to be created by the bankruptcy itself. Under the Bankruptcy (Scotland) Act 1985,<sup>214</sup> the insolvent's estate, heritable and moveable, vests in the trustee; the undelivered goods, since they do not vest in the trustee, pass to the purchaser by a novel form of fictitious delivery--bankruptcy. A priority right against the bankrupt seller's trustee and creditors is not the general property referred to in section 61(1) and *The Odessa*;<sup>116</sup> an agreement whereby the purchaser, enjoying a personal right, is to attain such a priority amounts to an attempt at creating a security device in favour of the buyer, should the seller go bankrupt before delivering the goods in which the property has passed, an attempt prohibited by section 62(4) of the 1979 Act. Furthermore, even if one elevated this hybrid right into a *ius in re aliena* which the buyer enjoyed in goods which did not belong to him before they were delivered by the seller, such a classification would conflict with section 61(1), because the title to the goods would remain in the seller; would conflict with section 62(4), because on the seller's bankruptcy the buyer would be preferred to the other creditors even though no change in the possession of the goods had occurred; and would conflict with section 24, because, in the absence of prior contracts and of delivery of the goods, the wording logically requires seller and owner to be different persons.

The Scottish Law Commission<sup>215</sup> explains away most of the other effects which *Benjamin's Sale*<sup>216</sup> demonstrates that the passing of property under the 1893 Act has upon the laws of insurance, prize, crime, risk, and insolvency. Unnoticed goes an effect on the law of succession, observed by Battersby and Preston:<sup>217</sup>

[I]f property has passed, the goods form part of the estate of the buyer so that in the event of his death they will pass under a specific bequest; conversely, the passing of property from the seller would adeem a specific bequest of the goods contained in his will, and the proceeds would fall into residue.

Scots law of ademption of special bequests (legacies) of corporeal moveables is disputed. Sir Thomas Smith states:<sup>218</sup>

It would seem that, though Scots law has been heavily influenced by English doctrine on the subject of ademption, and has accordingly surrendered certain principles of Roman law, in one respect at least the solutions of Scots law and English law conflict. In Roman law, which Scots law followed, property did not pass by contract, and thus before delivery the object of the agreement remained part of the estate of the vendor. In English law it has been held that a contract of sale entered into after the date of a will and binding on the testator at his death is sufficient to cause ademption.<sup>219</sup> In Scotland the converse would seem to be true, and mere agreement would not operate ademption. In short, unless there is passing of title *inter vivos*, a special legacy is not adeemed though the testator had agreed to sell it. This view seems to be supported by the decisions, though the *rationes decidendi* could be formulated more narrowly.

Since ademption depends on the passing of legal title *inter vivos*, one would expect Sir Thomas to conclude that, because "property" is not synonymous with "title" in the 1893 and 1979 Acts,<sup>220</sup> his exposition of the Scots law of ademption of special legacies concerns heritage and moveables alike, and Battersby and Preston's argument is limited to English law of ademption. Yet in *Property Problems* Sir Thomas concedes: "Battersby and Preston make some valid points against Atiyah's contention that the consequences of the passing of property by agreement in sale are essentially confined to the original parties. In some cases creditors or legatees may certainly be affected."<sup>221</sup> That this is so emerges from two of Sir Thomas's references in his treatment of ademption. In *McArthur's Executors v. Guild*<sup>222</sup> the special legacy concerned heritage, an hotel which the testator sold on condition that the buyer should obtain a licence for it. The testator died the day before the licensing court granted the buyer the licence. Had the testator's legacy to Guild been adeemed by the conditional sale? The First Division followed the rulings of Lord Chancellor Thurlow in the English cases of *Ashburn v. Macguire*<sup>223</sup> and *Stanley v. Potter*,<sup>224</sup> the *rationes decidendi* of which were epitomised by Lord Ardwall in *McArthur* as follows: "The question whether or not ademption of a specific subject has taken place depends solely upon this other question, whether or not the subject of the bequest was at the date of the testator's death in existence, and formed part of his estate."<sup>225</sup> As heritage conformed to the Scots common law on the passing of property, the hotel still belonged to McArthur at his death, so fell into his estate, and Guild's

legacy was not adeemed. So far, *McArthur* backs Sir Thomas's exposition.<sup>218</sup> But *obiter dicta* in Lord President Dunedin's judgment suggest that Battersby and Preston's proposition is valid for corporeal moveables:<sup>226</sup>

I would further add that the English authorities quoted to us do not seem to touch the question, for the simple reason that by English law the contract of sale passes the property-- the exact opposite being true by the law of Scotland, and the law not having been altered as to heritable property *though it has been as to moveable*.

The clause which I have italicized is too widely stated, for ademption of a special legacy of shares follows the rules governing that of heritage.<sup>227</sup> But the clause applies to corporeal moveables: the horse mentioned by Lord Chancellor Thurlow<sup>228</sup> would, if sold yet undelivered, no longer form part of the testator's estate in Scots law. Again, Winder says of the quoted passage, which he puts into the mouth of Lord Moncreiff, "In English law it is certainly true that the legal title to a chattel can pass to the purchaser at the time of the agreement."<sup>229</sup> Sir Thomas's conceding Battersby and Preston's point about creditors and legatees is a puzzle. For him, ownership passes by delivery;<sup>230</sup> delivery has not yet occurred; so goods in which property has passed under the 1893 and 1979 Acts still belong to the seller. Yet, if the goods still belong to the seller, they are part of his estate; the estate vests in the trustees or executor for distribution; so why do the creditors or legatees not take, through the trustee or executor, what remains part of the estate when bankruptcy or death strikes? In *Property Problems*, Sir Thomas denies that "property" and "title" in the 1893 Act are synonymous;<sup>231</sup> in *A Short Commentary*, he states that ademption of a special legacy depends on the passing of title *inter vivos*;<sup>218</sup> in *Property Problems* he agrees with Battersby and Preston that creditors and legatees may be affected by the passing of property:<sup>221</sup> the legatees can only be affected here by the passing of title *inter vivos*; in the present context, property passes as between seller and buyer under the Act; no other title is mentioned by the Act as passing to the buyer; delivery has not yet occurred; the legacy is adeemed-- yet "property" and "title" are not synonymous!

The idea that property should pass by sale alone has been criticized for undermining credit.<sup>232</sup> Delivery, by contrast, concerns possession, which, since it notifies strangers of the contracting parties' proprietary arrangements, is the foundation of credit. Such is the case with actual delivery in public view of a small community keenly observant of the spectacle. This village idyll is at variance with the reality of life in a city of millions, most of them bustling about on their own business. Once the

Romans allowed the various types of fictitious delivery, third parties were unlikely to have an invariably accurate picture of the contracting parties' proprietary arrangement anyway. *Traditio brevi manu* at least confirmed what strangers had hitherto--erroneously-- inferred: that the transferee owned his possessions. But *traditio longa manu* ended with the massive articles still in the transferor's possession, and, although delivery is accomplished by pointing out of the objects *inter praesentes*,<sup>233</sup> those *praesentes* are the contracting parties and not necessarily third parties, who may be none the wiser that the columns belong to someone other than their possessor. *Constitutum possessorium* was the ultimate fable, two halves of an agreement, so that Sir Thomas's rhetorical question ending his example of the warehousing company-- "Why should the company be prejudiced by a mere agreement as to property 'as between seller and buyer'?"<sup>234</sup> -- strikes equally at *constitutum possessorium* if delivery occurs in that form. The idea that property may pass *solo consensu* is a more realistic approach to the problem which *constitutum possessorium* is intended to solve: the fictitious pretence that an oral agreement can be delivery of the goods is swept away by the idea that ownership need not pass by delivery.

(3) The sceptics' chief objection is that, as ownership is a real right, and the touchstone of real rights is that they avail against all the world, property which passes "as between seller and buyer" cannot be ownership.<sup>235</sup> The comfortable absolute that real rights avail against all the world, together with the corollary, *ubi rem meam invenio, ibi vindico*, is absorbed by every undergraduate in the first months of training in civilian law. It may therefore seem heretical to contend that this absolute has never been strictly true but always partly fictitious. But then we have already seen that, at least so far as real rights, delivery, and communication are concerned, theory and reality may diverge.<sup>236</sup>

In Roman law the rights of the *dominus* were qualified by *usucapio*: one year's uninterrupted, continuous possession of a moveable by a *bona fide* possessor gave *dominium* and, according to Gaius,<sup>237</sup> enabled acquisition of something transferred by a non-owner.<sup>238</sup> *Usucapio* was a civil mode of acquisition; subjects which it could not reach were governed by *longi temporis praescriptio*, formed by imperial enactments.<sup>239</sup> By Justinian's time, *longi temporis praescriptio* had widened from a defence into a mode of acquisition,<sup>240</sup> and "the two systems were more or less fused.... The new system appears to have followed the rules of *praescriptio*, but the period for moveables was fixed at three years, it was directly acquisitive, and probably it was interrupted by *litis contestatio*."<sup>241</sup> In *usucapio* and *longi temporis praescriptio* are seen the roots of the

doctrine that an owner unvigilant of his right and, if challenged, careless of its prompt assertion will lose it to a more deservingly energetic claimant: though *res furtiva* could not be acquired by *usucapio*, an exception applied if the "owner knew where the thing was and there was no obstacle to his vindication of it."<sup>242</sup> Doziness of the *dominus* qualified *ubi rem meam invenio*, and the full version of the *traditionibus* principle at the foundation of the Scots common law of delivery was *traditionibus et usucapionibus non nudis pactis transferuntur rerum dominia*.

Nowadays, when the State impinges far more upon the owner's rights than ever it did in Roman times, besides limitations on the uses to which the owner may put his moveable there are public-law interferences which he cannot prevent. His moveable may be commandeered or requisitioned in war or national emergency; if it is a weapon covered by section 1 of the Firearms (Amendment) Act 1988 (chapter 45) and possession of it has not been authorized by the Secretary of State, the private ownership of this moveable has been prohibited; any compensation distributed by the Government merely softens the owner's dissatisfaction at his deprivation. In private law, under the legislation on sale of goods, the owner's safeguard of *nemo dat* is circumscribed by qualifications regarding estoppel and the leaving of his goods in the hands of opportunistic factors and unreliable buyers and sellers. To this general category of liabilities upon ownership may be assigned the rights and powers of the unpaid seller who has passed the property to the buyer but not yet delivered the goods. Once a single exception to the absolute rule that real rights avail against all the world is conceded, the question becomes a matter of determining the number and extent of the exceptions. The real right subsists in so far as not excluded or circumscribed. This view of the residual nature of the real right vesting in the buyer after property has passed under the sale exposes weaknesses in two passages of Lawson's article quoted by the Scottish Law Commission.<sup>243</sup> Referring to the Factors Acts, he continued:<sup>244</sup>

Thus English law reached its present state by the hard way of trial and error. ... [W]hat seems to have been in the mind of the legislature was a notion that third parties should not be adversely affected by anything agreed on by the parties *inter se* in the contract of sale or in the manner of carrying it out, unless they had notice of it. Chalmers gave correct expression to this notion when he headed the sections on the passing of property and risk 'Transfer of Property as between Seller and Buyer.'

And again:<sup>245</sup>

[I]n the common law the treatment of the contract of sale as passing the property in goods preceded in time the recognition of its obligatory effect, debt and *detinue* being in origin proprietary rather than contractual remedies; hence the difficulty has been to see that later developments have limited the effects of the passing of property to the relations between the parties.

But if the effects of the passing of property were confined to the relations between the contracting parties, then on the seller's bankruptcy the trustee, not being the seller, could attach the undelivered goods in which property had passed to the buyer who had paid the full price. Further, nothing which the parties agree on *inter partes* can adversely affect third parties unaware of the existence or performance of the sale-- yet the bankrupt seller's creditors, even if unaware of the sale under which property passes, *are* adversely affected by the purchaser's being allowed, on payment of the full price, to keep the goods themselves rather than rank as a general creditor, particularly if the price of the goods has risen since the sale.

What, finally, are we left with? A hybrid right resembling a *ius ad rem* but conferring on the buyer a priority right in competition with the bankrupt seller's creditors; or a real right of ownership, readily defeasible in the initial stages of its creation, and confined to the contracting parties' relationship until the full price is paid or tendered. One solution infringes the mutual exclusivity of real and personal rights; the other, the universal application of real rights: both are breaches of the legal logic of real and personal rights. Escape from this inexorable system is, for the present, impossible.<sup>246</sup> Escape being impossible, the choice of illogicalities is a matter of taste. In my opinion, the hybrid right and its priority effect, based on no wording of the 1893 or 1979 Acts, lack theoretical basis; the right of ownership, closely restricted to begin with but gradually extending as restrictions are lifted by the purchaser's payment, is a more coherent basis reconcilable with the exceptions allowed to the rule on the universal application of real rights. The buyer's action against the seller for restitution *in specie* of the goods in which property has passed under a sale presents Scots lawyers with something of the doctrinal quandary which the problem of evil presents to philosophers and theologians.<sup>247</sup> For the time being, one conclusion which both sides will readily support is that, in describing the transfer of *dominium* by contract rather than by *traditio* as "simplicissimum,"<sup>57</sup> Grotius inclined to hyperbole. Comparison of the respective justifications and consequences of fictitious delivery and of passing of property by agreement alone reveals that, in Algernon's words from *The Importance of Being Earnest*, the truth is seldom pure and never simple.

For increased range of comparison, we may note that the French idea of the



specific enforcement of a sale spread to the legal systems of Italy, Spain and Portugal, as well as to those of many former colonies of Spain and Portugal, such as Louisiana.

### Italy

If the parties intend to transfer the ownership of a determined thing, ownership passes by virtue of their consent lawfully expressed.<sup>248</sup> Then, if the debtor does not deliver this moveable, the person entitled to it can obtain enforced delivery (*consigna*), according to the rules of the Code of Civil Procedure,<sup>249</sup> which are set out in articles 605 and following.<sup>250</sup> The precept (*precetto*) for delivery must contain, besides the requirements of article 480 *Codice di Procedura Civile* 1940, a summary description of the goods themselves.<sup>251</sup> If the execution title<sup>252</sup> fixes a time for the delivery, the notification is made with reference to that time,<sup>253</sup> not the ten days prescribed by article 480 I C.P.C. After the period indicated in the precept has expired, the bailiff (*l'ufficiale giudiziario*), armed with the execution title and the precept, goes to the place where the goods are located and searches for them in accordance with article 513 C.P.C., then delivers them to the plaintiff or the person designated by him.<sup>254</sup> Pledged things cannot be specifically delivered.<sup>255</sup> If in the course of the execution, difficulties arise which do not admit of delay, either party may request the magistrate (*pretore*), even orally, for the requisite measures.<sup>256</sup> In the oral process the bailiff specifies all the costs expected by the plaintiff. These are taxed by the magistrate with a decree which constitutes an execution title.<sup>257</sup>

### Spain and Portugal and former colonies

The French law on the present subject influenced the laws of Spain, Portugal, and the former American colonies of these powers. Rabel noted in 1936:<sup>258</sup>

Der Käufer kann überall den Lieferungsanspruch im Klagewege verfolgen, wie sich aus den den Art. 1184 und 1610 des Code civil nachgebildeten Bestimmungen der meisten Rechte ergibt.<sup>259</sup> ...

Die Vollstreckung des Erfüllungsanspruchs geschieht durch Wegnahme der beim Schuldner vorhandenen Spezies- oder Genussachen. Werden sie nicht vorgefunden, so wird wegen des Werts und Schadenersatzes, den der Gläubiger im Vollstreckungsverfahren-- häufig eidlich-- angibt, vollstreckt....<sup>260</sup> Uruguay und Venezuela kennen ein beschleunigtes Verfahren ohne Urteil für Lieferansprüche....<sup>260a</sup>

### Louisiana

The buyer's right to specific enforcement of the sale of goods has, until recently, been rendered doubtful by the divergence of code and jurisprudence.

The Civil Code of Louisiana, enacted in 1808 and amended in 1825 and 1870, contains many references to specific enforcement. From those comprehensively discussed by Abbott<sup>261</sup> and Jackson<sup>262</sup> I select the ones bearing on the present topic.

Specific enforcement is mentioned in the articles on obligations in general, and contractual validity;<sup>263</sup> receives equal ranking with damages in article 1803; and, under article 1799, forms part of every contract by way of a rebuttable presumption.<sup>264</sup>

French influence shaped article 1905, which distinguishes between obligations to give<sup>265</sup> and obligations to do or not to do. By article 1907, giving includes delivery; and if the thing is particularly specified, then, by article 1909,<sup>266</sup> the obligation is perfected by the parties' mere consent, rendering the creditor owner, and placing the goods at his risk if the contract effects transfer. Their subsequent destruction before delivery does not free the buyer from paying the price.<sup>267</sup>

These rules are reinforced by those on sale. Article 2456 echoes 1909 as to perfection of sale and transfer of property once object and price have been agreed, though transfer and payment remain outstanding. (Even as regards unspecific fungibles, the sale of which is imperfect, the buyer may still claim either their delivery or else damages for breach.<sup>268</sup>) Articles 2471 and 2472 link transfer of risk to transfer of *la propriété*, interpreted by Abbott<sup>269</sup> as "ownership" but by Theriot as "a mere personal right ... existing only between the parties, to demand performance of the obligation to give."<sup>270</sup>

Procedural law supports the Civil Code. The Code of Practice 1825 entitled the buyer to compel delivery<sup>271</sup> and to have disposal of or harm to the property enjoined, with appropriate penalties<sup>272</sup> throughout the action.<sup>273</sup> Under article 628, judgments might order that something should be given, done, or omitted, and forms of execution would vary accordingly. Articles 39 and 628 were excluded from the Code of Civil Procedure 1960, which confirmed and extended the prior legislation. "A court," runs the new article 191, "possesses inherently all of the powers necessary for the exercise of its jurisdiction even though not granted expressly by law." So articles 2298 and 3601 authorize preservative injunctions. Article 2501, succeeding article 634 of the 1825 code, enables the holder of a judgment of possession to "obtain from the clerk a writ of possession directing the sheriff to seize and deliver the property to him if it is movable property...." Article 2502, bettering article 635, states

If a judgment orders the delivery of a thing and the sheriff cannot seize it because the defendant has concealed it or removed it from the jurisdiction of the court, or when the judgment orders a defendant to do or refrain from doing an act other than the delivery of a thing, and he refuses or neglects to comply with the order, the party entitled to performance may obtain by contradictory motion the following remedies:

- (1) A writ to distrain the property of the defendant;
- (2) An order adjudging the disobedient party in contempt; or
- (3) A judgment for any damages he may have sustained. He may likewise sue for damages in a separate action.

The writ of *distringas* was an old measure of the English common law courts to support a judgment of detinue or replevin; was limited there to seized property worth forty shillings,<sup>274</sup> but was introduced into Louisiana by the New-York trained draftsman, Edward Livingston, without this limitation; and, though ignored by the courts, could prove more effective than the French *astreinte*.<sup>275</sup> Article 2503 specifies its operation in Louisiana:

the sheriff shall seize the property of the defendant and retain it in his possession subject to the orders of the court.

The court shall revoke the writ, and order the sheriff to release and return to the defendant all property seized thereunder, when the defendant proves that he has complied with the judgment sought to be enforced through *distringas*, and has also satisfied any judgment for damages which the plaintiff may have obtained against him because of his noncompliance with the judgment first mentioned.

Perishable property seized ... may be sold as provided in Article 2333. The proceeds of such a sale shall be held by the sheriff subject to the orders of the court.

The substantive and procedural articles combine to support the plaintiff's choice of specific enforcement of the sale of goods; but his right is weakened by the mistranslation of one article and the training of lawyers outside Louisiana.

The article is 1927 of the Civil Code:

In ordinary cases, the breach of such a contract [to do or to refrain<sup>276</sup>] entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the courts.

Abbot remarks:<sup>277</sup>

The use of "inadequate compensation" in the article is unfortunate since these words are used in the Anglo-American test of whether specific performance should be granted. This has permitted arguments by attorneys trained in common law that the chancery test is applicable in Louisiana. Perhaps a better translation would have been: "insufficient indemnity" [reflecting the words in the French text of 1825: "indemnité insuffisante."<sup>278</sup>]

Jackson's comments differ slightly:<sup>279</sup>

Article 1927 of the Louisiana Civil Code has no *Code Napoléon* counterpart and ... is couched in the precise language of the Anglo-American jurisprudence dealing with the granting of specific performance by chancery courts. Conflicting inferences may be drawn from the fact that *in personam* powers were not utilized in France to enforce contracts and, on the other hand, the fact that Edward Livingston was familiar with the common law (including chancery practice) as well as the law of France. If the Code of Practice is ignored and since the terminology is that of the common law, it may be argued that article 1927 contemplates specific performance in the normal chancery sense enforceable by contempt proceedings in breaches of obligations to do or not to do. This is not clear....

In looking to Anglo-American authorities for guidance on damages adequacy,<sup>280</sup> Louisiana courts have not only ignored the procedural endorsement of specific relief in the Code of Practice and the Code of Civil Procedure, but have also either ignored the distinction between obligations to give (under which the delivery of a specific *res vendita* falls) and obligations to do (which are governed by the article in question, 1927), or else have redefined the seller's duty of giving as one of doing.<sup>281</sup> This judicial manoeuvring baffles novices to Louisiana law: it is as though the courts of France, Belgium, and Italy had begun speaking in the terms of English equity; and as though the French jurists, instead of explaining the nature of the buyer's rights in and to the sold goods, had spent their time playing tiddly-winks. Theriot criticized the view that the Louisiana buyer acquired ownership of the specific goods on conclusion of the sale, but conceded that when specific performance was narrowly administered by the courts, the right of ownership did favour the buyer<sup>282</sup> -- the parallel with Scots law, if we suppose "property" to be less than ownership, and *Union Electric* to state the rules on specific implement, is striking. Theriot continued:<sup>283</sup>

As the jurisprudence developed ..., specific performance of sales gained greater acceptance and the clear weight of the jurisprudence in Louisiana now accepts the proposition that the buyer's right to specific performance, if he

chooses to exercise it, will be enforced. Moreover, in recognition of the current jurisprudence, the Civil Code revisions in the law of obligations have made clear the buyer's right, if he chooses, to specifically perform the sale. Therefore, in considering the buyer's ability to get the thing that he has contracted to buy, there appears little difference between the right of ownership prior to delivery and the right to specific performance.

As proof of this jurisprudential change, he cites *Staple Cotton Coop. Assn. v. Pickett* (1976); *Watson v. Bethany* (1946); *Kinberger v. Drouet* (1922); *Choctaw Home Builders Inc. v. Lena, Inc.* (1969); *Muller v. Morgan* (1965); *J. Weingarten Inc. v. Northgate Mall Inc.*<sup>284</sup> To these may be added, on the sale of moveables, *Mente & Co. v. Roane Sugars Inc.* (1942) and *Oliver v. Home Serv. Ice Co., Inc.* (1935).<sup>285</sup> But he also cites *TSC Motor Freight Lines v. Leonard Trucklines, Inc.* (1944) and *Gray v. Premier Inv. Co.* (1943), in the latter of which the court held: "Ordinarily, specific performance will not be decreed or injunction issued to prevent a breach for the sale or delivery of personal property."<sup>284</sup> To this contrary list can be added *Driskell v. Sumlin* (1960)<sup>285</sup>.

The jurisprudence may be a little uncertain still; but the new article 1986 of the Civil Code has, since 1984,<sup>286</sup> untangled the judicial muddle of obligations to give and to do:

Upon an obligor's failure to perform an obligation to deliver a thing, or not to do an act, or to execute an instrument, the court shall grant specific performance plus damages for delay if the obligee so demands. If specific performance is impracticable, the court may allow damages to the obligee. Upon failure to perform an obligation that has another object, such as an obligation to do, the granting of specific performance is at the discretion of the court.

The Civil Code, the Code of Practice, and the Code of Civil Procedure had, however, always provided the buyer with specific relief.

#### Notes

1. 1949 S.C. 49; C.S. 258/23150 of 1950.
2. C.S. 258/23150 of 1950, 15 July 1949. The signatory was L.J.-C. Thomson, who had appeared as Lord Advocate and second defender to the action as originally raised.
3. 1949 S.C., 51.
4. *Id.*, 52.

5. BELL, PRINCIPLES s. 1303 (10th ed.); 1949 S.C., 52-3.
6. 1949 S.C., 53.
7. Jones v. Tankerville [1909] 2 Ch. 440, 442; Morison v. Lockhart 1912 S.C. 1017 (1st Div.); Kursell v. Timber Operators and Contractors [1927] 1 K.B. 298 (C.A.).
8. Jones, *supra* note 7.
9. 1949 S.C., 54-5.
10. The L.P. one presumes meant the sentence "and the contrary has been determined with regard to trees, which are *partes soli*, and can be transferred only by actual removal and delivery (*d*).'" The single inverted commas indicate that the sentence and the authorities cited in footnote (*d*)--BRODIE'S STAIR 867; Paul v. Cuthbertson, 1840, 2 D. 128; Elder v. Allen, 1833 11 S. 902; Anderson v. Ford, 1844, 6 D. 1315-- were inserted by the editor, Guthrie: *see* Preface to the 10th ed., second para., and the absence of the clause and footnote from Bell's own 4th ed., vol. 2, p. 486 (1839).
11. 1949 S.C., 55.
12. *Id.*, 55-6.
13. *Id.*, 56.
14. Appendix to the Reclaiming Motion for the First-Named Defender: C.S. 258/23150 of 1950, 28, 45.
15. *Id.*, 30, 45.
16. *Id.*, 34, 12th cl.; *id.*, 11th clause.
17. In West Stockton Iron Co. Ltd. v. Nielson and Maxwell, 1880, 7 R. 1055 (2d Div.), Ld. Gifford (1060) had characterized sawmilling as a contractual activity not requiring a *delectus personae*.
18. 1949 S.C., 50 *per* L.O.; 53-4 *per* L.P.
19. BENJAMIN'S SALE 339 and n. 47.
20. Congreve v. Evetts, 10 Exch. 298, 308 (1854); 156 E.R. 457, 461-2.
21. DIG. JUST. 41.2.1.21.
22. Cf., S.A. law: VAN DER MERWE, SAKEREG 213; SILBERBERG & SCHOEMAN, PROPERTY 268; CAREY MILLER, OWNERSHIP 148.
23. Sched., Sale of Goods Act 1893.
24. 1949 S.C., 51, 52.
25. Appendix, *supra* n. 14, 28, 44.
26. Gow, 1962 S.L.T. (News) 13, 14.
27. Morison, 1912 S.C., 1027; Gow, *supra* note 26, 14. In Munro 1949 S.C., 54, L.P. Cooper held that the L.O. had taken rather more from Jones than it could bear. Jones confirmed the buyer's licence to enter upon the estate to fell and remove the timber forming the subject of the sale. Jones was therefore no weaker than Morison, which the L.P. followed (1949 S.C., 55). Perhaps the L.P. objected to the L.O.'s describing the buyer's licence as "irrevocable".
28. 1912 S.C., 1026; Gow, *supra* note 26, 14.
29. 1912 S.C., 1023-5; Gow, *supra* note 26, 14-5.
30. Gow, *supra* note 26, 15-6.
31. 1912 S.C. 1027, Lds. Kinnear, MacKenzie.

32. *Id.*, *Ld. Johnston*; 1949 S.C. 49, L.O., L.P.
33. *Ballard v. N.B. Ry.* 1923 S.C. (H.L.) 43, 56.
34. 1912 S.C., 1028.
35. T. Süß, *Das Traditionsprinzip-- Ein Atavismus des Sachenrechts*, FESTSCHRIFT FÜR MARTIN WOLFF 141, 146 and nn. 7, 8, 10-2 (E. von Caemmerer *et al.* (eds.), 1952).
36. *Id.*, 147-8 and nn. 16-23. To these we may add India (T.B. SMITH, *PROPERTY PROBLEMS IN SALE*, *esp. 39 et seq.* (1977)) and the other Commonwealth countries which have adopted the principles of the English law on the sale of goods.
37. Süß, *supra* note 35, 148.
38. *Id.*, 147. For my survey of French law I have relied on Amos, 17 L.Q.R. 372 (1901); 1 C. AUBRY & C. RAU, *COURS DE DROIT CIVIL FRANÇAIS* (6e éd., 1942; tr. Louisiana State Law Institute); M. PLANIOL, *TREATISE ON THE CIVIL LAW* Vol. 2 Part 1 (11th Ed., Vol. 2, 1939, tr. by Louisiana State Law Institute 1959); 1 R. DEKKERS, *PRÉCIS DE DROIT CIVIL BELGE* (1954) (hence 1 D, PDCB); Szladits, 4 A.J.C.L. 208 (1955); Dawson, 57 MICH. L. REV. 495 (1959); 2 G. RIPERT & J. BOULANGER, *TRAITÉ DE DROIT CIVIL* (1957) (hence 2 R & B, TDC); 2 A. COLIN & H. CAPITANT, *TRAITÉ DE DROIT CIVIL* (1959) (hence 2 C & C, TDC); M. WAELBROECK, *LE TRANSFERT DE LA PROPRIÉTÉ DANS LE VENTE D'OBJECTS MOBILIERS CORPORELS EN DROIT COMPARÉ* (1961) (hence W, TP); R. Houin, *Sale of Goods in French Law*, in *SOME COMPARATIVE ASPECTS OF THE SALE OF GOODS* I.C.L.Q. Supp. Pub. No. 9 (1964); J. CARBONNIER, *THÉORIE DES OBLIGATIONS* (1963) (hence C, TO); J. CARBONNIER, *DROIT CIVIL* Vol. 3 (11e éd., 1983) (hence 3 C, DC); Vol. 4 (11e éd., 1982) (hence 4 C, DC); G. MARTY & P. RAYNAUD, *DROIT CIVIL* Tome II-- 1er Vol. (1er éd., 1962) (hence 2(1) M & R, DC); Tome II-- 2e Vol. (1er éd., 1965; 2e éd., 1980) (hence 2(2) M & R, DC); P. CUCHE & J. VINCENT, *VOIES D'EXÉCUTION* (10e éd., 1970) (hence C & V, VE); Treitel, VII I.E.C.L. ch. 16 12-5 (1974); J. MAZEAUD, J. MAZEAUD, L. MAZEAUD, & F. CHABAS, *LEÇONS DE DROIT CIVIL* Tome II-- 1er Vol. (7 éd., 1985) (hence 2(1) MMMC, LD), Tome II-- 2e Vol. (6e éd., 1984) (hence 2(2) MMMC, LD); B. STARCK, *DROIT CIVIL: OBLIGATIONS* (2e éd., 1986); Macdonald, 31(4) MCGILL L.J. 573 (1986); 32(1) MCGILL L.J. 1 (1987).
39. J. BRISSAUD, *A HISTORY OF FRENCH PRIVATE LAW* para. 237 *et seq.* (2d ed. tr. by R. How, 1912); 2(2) MMMC, LD No. 1519-24; Macdonald, 31(4) MCGILL L.J., 592 n. 85.
40. 2 C & C, TDC No. 25. *See* Macdonald's explanation of this attitude in the Quebec Civil Code of Lower Canada: 31(4) MCGILL L.J., 580-1, nn. 25-6.
41. BRISSAUD, *HISTORY*, para. 239.
42. *Id.*, paras. 240-2.
43. *Id.*, para. 239 and p. 291 n. 1.
44. *Id.*, p. 296 and n. 2.
45. *Id.*, paras. 296-300.
46. *Id.*, para. 300.
47. *Id.*, paras. 300-2.

48. *Id.*, para. 302.
49. *Id.*, p. 302.
50. *Id.*, para. 237, p. 288.
51. F. BOURJON, DROIT COMMUN DE LA FRANCE (1747), quoted in 2(2) M & R, DC No. 390.
52. BRISSAUD, HISTORY, paras. 303-4.
53. 2 R & B, TDC No. 2442, 2445; 2 C & C, TDC No. 519; 2(2) M & R, DC No. 52 A); 2(2) MMMC, LD No. 1615; 2 AUBRY & RAU, COURS DE DROIT p. 274.
54. A. LOISEL, INSTITUTES COUTUMIÈRES No. 392 (1607), quoted in 2(2) MMMC, LD No. 1615. In the 1765 edition held by the Advocates' Library, the passage is at Liv. V Tit. VII on page 187 of Volume II.
55. J. DOMAT, LOIX CIVILES I.II.II.VIII., cited in 2(2) MMMC, LD No. 1615 and n. 4.
56. 2(2) MMMC, LD No. 1615; 2(2) M & R, DC No. 52 A).
57. Süss, *supra* n. 35, 147.
58. Dawson, 57 MICH. L. REV., 510.
59. 2(2) MMMC, LD No. 1616; 2 R & B, TDC No. 2447.
60. 13 P.A. FENET, RECEUIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 215 (1827), quoted in 2(2) MMMC, LD No. 1616; 2 R & B, TDC No. 3447.
61. a. 544 C. CIV.
62. 2 C & C, TDC No. 221.
63. a. 711 C. CIV.
64. Similar rules for donation (a. 938 C. CIV.), exchange (a. 1703 C. CIV.).
65. 2 R & B, TDC No. 2444.
66. 1 D, PDCB No. 1106; 2 C & C, TDC No. 525; 2(2) MMMC, LD No. 1619.
67. W, TP No. 8; 2(2) MMMC, LD No. 1619.
68. W, TP No. 8.
69. W, TP. No. 19.
70. Commissioner of Customs and Excise v. Randles Bros. & Hudson Ltd. 1941 A.D. 369; Scottish Law Commission Memorandum No: 25 Corporeal Moveables: Passing of Risk and Ownership 31 August 1976 11 and n. 11; VAN DER MERWE, SAKEREG 204-10; SILBERBERG & SCHOEMAN, PROPERTY 75-82; CAREY MILLER, OWNERSHIP 124-5.
71. 1 D, PDCB No. 941: "l'action réelle en revendication.-- L'article 2279 a pour but de paralyser cette action. Mais le demandeur a prouvé, par hypothèse, que l'article 2279 ne s'appliquait pas (le défendeur n'étant pas possesseur mais seulement détenteur). Dès lors l'action réelle en revendication subsiste."
72. 1 D, PDCB No. 932 *et seq.*; W., TP No. 73-6; 2(2) M & R, DC No. 392-9; 2(2) MMMC, LD No. 1526. Examples of articles exempt from a. 2279(1) are those whose transmission is required to be public (*e.g.*, ships, aeroplanes), goods in the public domain and legally inalienable (*e.g.*, the Monet paintings stolen from the Musée Marmottan and found in Japan); juridical universalities. Special rules govern negotiable instruments.



73. 1 D, PDCB No. 929; W, TP No. 77; 2(2) MMMC, LD No. 1537-9.
74. Amos, 17 L.Q.R., 374; 2 R & B, TDC No. 2449; 2 C & C, TDC 521-4; W, TP No. 10; 2(2) M & R, DC No. 53; 2(2) MMMC, LD No. 1618.
75. Amos, 17 L.Q.R., 373; 2 AUBRY & RAU, p. 86; Szladits, 4 A.J.C.L., 215; Dawson, 57 MICH. L. REV., 510-1; 2 R & B, TDC No. 203; W, TP No. 6; Treitel, VII I.E.C.L. ch. 16 13; 2(2) MMMC, LD No. 899.
76. 1 D, PDCB No. 1108.
77. *Id.*, No. 954.
78. *Id.*, No. 942.
79. Dawson, 57 MICH. L. REV. esp. 505; 2(1) PLANIOL, TREATISE p. 104 n. 1; FISCHER, GESCHIEDENIS 157-62; 2 R & B, TDC No. 1609 and n. 1; Groenewald, Specific Performance 519-22; 4 C, DC [145].
80. Dawson, 57 MICH. L. REV., 507-8 and n. 35.
81. *Id.*, 509-10.
82. *Id.*, n. 41: "2 POTHIER, TRAITÉ DU CONTRAT DE VENTE [No.] 68, 480 (Oeuvres, 1824); 3 TRAITÉ DU CONTRAT DE LOUAGE [No.] 66, the last-cited section containing the language quoted."
83. Dawson, 57 MICH. L. REV., 509, 510.
84. *Id.*, 510, 502.
85. See authorities, *supra* n. 75, and 2 C & C, TDC No. 887.
86. 2(1) M & R, DC No. 663 (1er éd., 1962). See, also, Szladits, 4 A.J.C.L., 214-5 and n. 31; Treitel, VII I.E.C.L. ch. 16 13; 2(1) MMMC, LD No. 934-5.
87. Authorities in note 86, and also 1 AUBRY & RAU, COURS DE DROIT p. 38 n. 3.
88. Amos, 17 L.Q.R., 373; Szladits, 4 A.J.C.L., 215 and n. 33; Dawson, 57 MICH. L. REV., 511; C; T [226] B) 1; 4 C, DC [143]; P. HERZOG & M. WESER, CIVIL PROCEDURE IN FRANCE 556 and n. 30 (1967); Treitel, VII I.E.C.L. ch. 16 17; STARCK, DROIT CIVIL Nos. 1343-4 (1986).
89. This is a recurrent contrast between English and French law in Dawson's article, 57 MICH. L. REV., 511-2, 524, 532.
90. Szladits, 4 A.J.C.L., 214.
91. 7 DALLOZ, ENCYCLOPÉDIE s.v. "Revendication" Nos. 1-4; Amos, 17 L.Q.R., 373; 1 D., PCDB No. 1121; HERZOG & WESER, CIVIL PROCEDURE 250; 2(2) MMMC, LD No. 1627-8; Macdonald, 31(4) MCGILL L.J., 601. However, Macdonald states that the French theory of the *action en revendication* is not settled (*id.*, 616) and that the action is in practice no longer simply a petitory action for vindicating ownership or even a real right (*id.*, 618). His detailed, still-incomplete study in 31(4) MCGILL L.J. 573-654, 32(1) MCGILL L.J. 1-95 works out a theory of the remedy in Quebec law.
92. C & V, VE No. 88 *bis* and n. 1; Macdonald, 31(4) MCGILL L.J., 603 n. 129.
93. HERZOG & WESER, CIVIL PROCEDURE 235 n. 15.
94. L. CRÉMIEU, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE ET VOIES D'EXÉCUTION No. 209 (1957); C & V, VE No. 89.
95. Arts. 826-31 C. PROC. CIV. [Ancien].
96. Treitel, VII I.E.C.L. ch. 16 13 and n. 90; C, TO [226] B) 1; 2(1) PLANIOL, TREATISE No. 173 (3); AMOS & WALTON'S INTRODUCTION TO

FRENCH LAW 181 and n. 1 (3d ed. by F.H. Lawson *et al.*, 1967); Szladits, 4 A.J.C.L., 215 and n. 33; STARCK, DROIT CIVIL No. 13431; Macdonald, 31(4) MCGILL L.J. 627 and nn. 226-8. Cf., Quebec law: Krassa, 21 C.B.R. 337, 355 (1943); J.-L. Baudouin, 5 MCGILL L.J. 108, 111 and nn. 18, 20 (1958); LES OBLIGATIONS No. 704 and n. 15 (1983).

97. a. 826 C. PROC. CIV.
98. 2 et 3-6 decr. 22 dec. 1958 mod. decr. 8 mai. 1968.
99. a. 827 C. PROC. CIV.
100. a. 23, decr. 22 dec. 1958.
101. a. 828 C. PROC. CIV.
102. C & V, VE No. 89.
103. a. 830 C. PROC. CIV.
104. 4 DALLOZ, NOUVEAU RÉPERTOIRE DE DROIT No. 9 (2e éd., 1965).
105. a. 829 C. PROC. CIV.
106. 4 DALLOZ, NOUV. RÉP. No. 10; C & V, VE No. 89 *bis*.
107. a. 829 C. PROC. CIV.; C & V, VE 89 *bis*; 4 DALLOZ, NOUV. RÉP. No. 10.
108. 4 DALLOZ, NOUV. RÉP. No. 10; C & V, VE No. 89 *bis*.
109. 4 DALLOZ, NOUV. RÉP. No. 10.
110. a. 831 C. PROC. CIV.
111. 4 DALLOZ, NOUV. RÉP. No. 12; C & V, VE No. 90.
112. 5 AUBRY & RAU, DROIT CIVIL No. 354, p. 53 (6e éd., 1952).
113. *Supra* p. 324.
114. Hayman v. McIntock 1907 S.C. 939, 949 (1st Div.) *per* L.P. Dunedin.
115. COKE, ON LITTLETON 145b.
116. The Odessa [1916] 1 A.C. 145, 158 (P.C.) *per* Ld. Mersey. *See*, also, Attenborough v. Solomon [1913] A.C. 76, 84 *per* Ld. Haldane L.C., who classified pledge as a bailment. The origin of the bailee's "special property" was traced by Bordwell, 29 HARV. L. REV. at 745 (1915-16).
117. *The Odessa*, *supra* note 116, at 158.
118. Burdick v. Sewell (1884) 13 Q.B.D. 159, 175, *per* Bowen L.J.
119. S. 61(1), Sale of Goods Act 1979.
120. *Id.*, s. 62(4).
121. BENJAMIN'S SALE para. 65 (2d ed., 1987); para. 58 (1st ed., 1974), quoted in Scottish Law Commission Memo. 25 20.
122. 1881, 8 R. (H.L.) 106, 111.
123. *Id.*, 112.
124. *See* BENJAMIN'S SALE 146 (2d ed., 1987).
125. Aldridge v. Johnson, 7 E. & B. 885 (1857); 119 E.R. 1476; Reid v. Macbeth & Gray, 1904, 6 F. (H.L.) 25; Laing v. Barclay & Co. [1908] A.C. 35; Re Blyth Shipbuilding Co. [1926] Ch. 494.
126. Christie, 9 J.R. 274, 276-8 (1897).
127. R. BROWN, TREATISE ON SALE xix, quoted by Scottish Law Commission Memo. 25 33 and n. 1.

128. BROWN, TREATISE xii.
129. Other implications: *infra* pp. 348 *et seq.*
130. S. 16, Sale of Goods Act 1979.
131. Aluminium Industrie Vaasen B.V. v. Romalpa Aluminium Ltd. [1976] 1 W.L.R. 676 (C.A.) and its brood, discussed in BENJAMIN'S SALE 227-45 and the references in 227 nn. 31-2.
132. STAIR, INST. 1.18.4.
133. Sections 34-48, Sale of Goods Act 1979.
134. *Id.*, s. 29.
135. See Lawson, 65 L.Q.R. 352 (1949); V. Kruse, 7 A.J.C.L. 500 (1958) and THE RIGHT OF PROPERTY Vol. II esp. 223-92 (1953); ATIYAH, SALE 217-22 (7th ed., 1985); Battersby and Preston, 35 M.L.R. 268 (1972); Scottish Law Commission Memorandum 25 (1976); SMITH, PROPERTY PROBLEMS esp. ch. 2 (1977); Davies, 7(1) LEG. STUDS. 1 (March 1987).
136. No provision in the 1979 Act exempts Scotland from the application of section 24.
137. [1965] A.C. 867.
138. (1905) 24 N.Z.L.R. 932.
139. [1972] 1 Q.B. 210.
140. ATIYAH, SALE 291.
141. *Id.*, 292.
142. *Supra* p. 325.
143. 2 C & C, TDC No. 527; 2(2) M & R, DC No. 418; 2(2) MMMC, LD No. 1623.
144. VAN DER MERWE, SAKEREG 245 and nn. 87-9; SILBERBERG & SCHOEMAN, PROPERTY 499-500, esp. n. 6; CAREY MILLER, OWNERSHIP 263-4, 300 and n. 341; 2 POLLOCK & MAITLAND, H.E.L. 155 and n. 22; Bishopsgate Motor Finance Corpn. v. Transport Brakes Ltd. [1949] 1 K.B., 336-7 (C.A.).
145. DIG. JUST. 44.7.25.pr.
146. DIG. JUST. 50.17.54 and *cf.*, also, 50.17.11.
147. M. McLUHAN & Q. FIORE, WAR AND PEACE IN THE GLOBAL VILLAGE (1968).
148. WINFIELD & JOLOWICZ, TORT 496-500; SALMOND & HEUSTON, TORTS 681-2; WALKER, CIVIL REMEDIES 46; PRINCIPLES, Vol. 4 260-1; DELICT 450 (2d ed., 1981).
149. Law Reform Committee, 18th Report Cmnd. 4774 (1971), p. 41.
150. Economic theory: chapter 17.
151. Law Reform Committee, *supra* n. 149, 39. *Cf.*, also, Branston, 28 L.Q.R. 262, 269 and n. 7 (1912).
152. WALKER, DELICT 450 and n. 9.
153. WALKER, DELICT 450.
154. S. 27, Sale of Goods Act 1979.
155. Law Reform Committee, *supra* n. 149, 40.
156. CLERK & LINDSELL, TORTS 296 and n. 21 (15th ed., 1982).

157. 6 M. & G. 1055, 1056 (1844); 134 E.R. 1220, 1221 *per* Tindal C.J.
158. [1951] 1 D.L.R. 203.
159. 10 C.B.N.S. 713 (1861); 142 E.R. 634.
160. *Devoe*, *supra* note 158, 217-8, 219-20.
161. (1960) 25 D.L.R. (2d) 380, 384-5, cited by Law Reform Committee, *supra* n. 149, 40 n. 2. *Cf.*, also, *Branston*, 28 L.Q.R., 274 and n. 3.
162. *Devoe*, *supra* note 158, 222.
163. *Doucette*, *supra* note 161, 386.
164. WALKER, CIVIL REMEDIES 46.
165. S. 24, Sale of Goods Act 1979.
166. It is hard, though, to see the objection to a single protester with a placard-- even the ladies of the Black Sash organization have been conceded as much by the South African Government.
167. Administration of Justice (Sc.) Act 1972 (c. 59). Professor Black kindly showed me this Act.
168. *Id.*, s. 1(1). *See*, also, R.C. 95A (Ct. of Session); O.C.R. 84 (sheriff court).
169. WALKER, CIVIL REMEDIES 222-3.
170. Professor Black tells me that if it happens that there are competing purchasers, the appropriate procedure for determining their respective rights will normally be an action of multiplepounding in which the detentor or custodier appointed under s. 1 of the 1972 Act appears as real or nominal raiser.
171. COD. JUST. 8.18.4.
172. S. 62(4), Sale of Goods Act 1979.
173. WALKER, DELICT 1002 and n. 1.
174. WALKER, *id.* cites CRAIG, JUS FEUDALE, who at 2.11.30 mentions the action "unde vi" concerning immoveables.
175. WALKER, DELICT 1003 n. 11.
176. ERSKINE, INST. 4.1.15.
177. WALKER, DELICT 1005.
178. *Cf.*, the mediate possession in German law, W, TP No. 27; F. BAUR, LEHRBUCH DES SACHENRECHTS 55-60 (13., Aufl., 1985); and the exercise of control through an agent in S.A. law, SILBERBERG & SCHOEMAN, PROPERTY 122 and n. 46.
179. *See* *Renton v. Renton*, 1629, M. 14733, 14739; *Title to Sect. IV* (M. 14737); *Haliburton v. Rutherford*, 1541, M. 14739; *Yeoman v. Oliphant and Moncreif*, 1669, M. 14740; *A v. B*, 1677, M. 14751. *Cf.*, S.A. law: VAN DER MERWE, SAKEREG 88 and n. 195; SILBERBERG & SCHOEMAN, PROPERTY 135.
180. *Detinue*: *supra* chapter 9. *Detinue* having been abolished, under s. 3(2) of the Torts (Interference with Goods) Act 1977 the court may grant a judgment for delivery of the goods and payment of consequential damages; but, under s. 2(3), this kind of award remains in the court's discretion.
181. WALKER, DELICT 1003 and nn. 8, 9.
182. *Id.*, 1011.
183. *Id.*, 1010.

184. Scottish Law Commission Memo. 25 46.
185. E. RABEL, DAS RECHT DES WARENKAUFS 1ste Band (1936).
186. *Id.*, 267.
187. Rabel's footnote 2 reads: "So ausdrücklich Unif. S.A., sect. 66; das gleiche gilt auch ohne Erwähnung im Gesetz in England, vgl. Benjamin [SALE OF GOODS 7th ed. by A.R. Kennedy, 1931] p. 1024 f., Chalmers [SALE OF GOODS ACT, 1893 (11th ed. by R. Sutton and N.P. Shannon, 1931)] p. 136."
188. Rabel's note 3 on page 267 reads: *Über Ver. Staaten* s. 9 R.C.L. 153 s.; N.Y.C.P.A. §§ 1089 s." (The italics in the quotations from page 516 appear in the text.)
189. Cf., S.A. law: CAREY MILLER, OWNERSHIP 143 n. 164: "Effective constructive delivery passes ownership which, of course, carries with it the right to vindicate from any party-- including one who obtained actual delivery subsequent to the effective constructive delivery. See Voet 6.1.20." In Scotland, vindication from someone who had received actual possession in good faith without notice of the prior *constitutum possessorium* would be excluded if the Privy Council's interpretation of s. 24 of the 1979 Act in *Pacific Motor Auctions* were followed: *supra* pp. 333-4.
190. *Supra* pp. 323-4, 199.
191. *Supra* pp. 136 *et seq.*, 199-200.
192. WALKER, CIVIL REMEDIES 285-8; 4 PRINCIPLES 283.
193. But *see* SMITH, SHORT COMMENTARY 625.
194. STAIR, INST. 1.7.2. Macdonald, 31(4) MCGILL L.J., 601 classifies the personal action of restitution of an object in Quebec law as in effect a delictual recourse enforced through a mandatory injunction.
195. 4 J. RANKINE *et al.* (eds.), THE SCOTS STYLE BOOK 60-1 (1903).
196. *Id.*, 61.
197. Henry, *supra* p. 222 *et seq.*
198. I am grateful to Professor Black, who corrected my solution expressed in terms of an interpleader action; outlined the Scots procedure of the two stages of sisting and then of the multiplepinding; and referred me to D. MAXWELL, THE PRACTICE OF THE COURT OF SESSION 231, 369 *et seq.* (1980).
199. In Britain, principally Lawson, Atiyah, the Scottish Law Commission, and Sir Thomas Smith: *supra* n. 135. In the nineteenth century, Bell had taken a sceptical view of the property passed by a sale of goods in uncoded English law: 1 BELL, COMM. 176-7; INQUIRIES INTO THE CONTRACT OF SALE OF GOODS 12-4, 26-7 (1854).
200. S. 48(2), Sale of Goods Act 1979; BENJAMIN'S SALE 719 ("the property is revested in the seller").
201. Scottish Law Commission Memo. 25 40.
202. SMITH, PROPERTY PROBLEMS 47-8.
203. Cf., s. 18(1), Sale of Goods Act 1979.
204. 1 D, PDCB No. 1108.
205. 2 R & B, TDC No. 2445.
206. Lawson, 65 L.Q.R., 360, quoted by Scottish Law Commission Memo. 25 37-8.

207. 1 D, PDCB No. 1110.
208. ATIYAH, SALE 221 n. 18.
209. 2(2) M & R, DC No. 418 and n. 3; 2(2) MMC, No. 1623 and n. 1.
210. 2 C & C, TDC No. 527; 2(2) M & R, DC No. 418; 2(2) MMMC, LD No. 1623.
211. Scottish Law Commission Memo. 25 51.
212. *Id.*, 44.
213. W.W. McBRYDE, THE BANKRUPTCY (SCOTLAND) ACT 1985, as to s. 31(4): "The vesting normally gives the trustee a real right to moveable property and not merely a personal right"; Standard Property Investment Co. Ltd. v. Dunblane Hydropathic Co. Ltd., 1884, 12 R. 328, 335 (1st Div.) *per* Ld. Shand: "The property of the bankrupt company is entirely transferred to the trustee as representing creditors who have completed diligence...."; 2 BELL, COMM. 319, the trustee in bankruptcy "is the trust proprietor and manager of the estate and its effects. He is fully vested with the estate and personal right of the debtor"; H. GOUDY, A TREATISE ON THE LAW OF BANKRUPTCY IN SCOTLAND 248 (4th ed. by T.A. Fyfe, 1914); W. WALLACE, THE LAW OF BANKRUPTCY IN SCOTLAND 148 (2d ed., 1914). The Quebec law on the nature of the trustee in bankruptcy's right is contested: 31(4) MCGILL L.J., 650 and n. 364.
214. (c. 66).
215. Scottish Law Commission Memo. 25 47-8.
216. BENJAMIN'S SALE paras. 295-300 (1st ed.); paras. 269, 271, 276-8 (2d ed.).
217. Battersby and Preston, 35 M.L.R., 278.
218. SMITH, SHORT COMMENTARY 444.
219. *Id.*, n. 81 refers to Pollock's Trs. v. Anderson, 1902, 4 F. 455; McArthur's Exrs. v. Guild 1908 S.C. 743; Tennant's Trs. v. Tennant 1946 S.C. 420; Winder, 1957 S.L.T. (News) 185.
220. SMITH, PROPERTY PROBLEMS 46-8 finds Battersby and Preston's argument unconvincing.
221. SMITH, PROPERTY PROBLEMS 46.
222. 1908 S.C. 743 (1st Div.).
223. 2 Br. C.C. 108 (1786); 29 E.R. 62.
224. 2 Cox 180 (1789); 30 E.R. 83.
225. McArthur, *supra* n. 222, 751.
226. *Id.*, 748.
227. Tennant's Trs., *supra* n. 219, 426.
228. Stanley, *supra* n. 224, 182; 84.
229. Winder, *supra* n. 219, 187.
230. SMITH, PROPERTY PROBLEMS 62-4, read with his criticisms of the passing of property "as between seller and buyer" (46-50).
231. *Id.*, 46-8.
232. 1 D, PDCB No. 1106.
233. BUCKLAND, TEXT-BOOK 227 and n. 6. *Cf.*, S.A. law: Xapa v. Ntsoko 1919 E.D.L. 177, 183; VAN DER MERWE, SAKEREG 213-4 and n. 102; SILBERBERG & SCHOEMAN, PROPERTY 269; CAREY MILLER,

OWNERSHIP 149 and n. 204.

234. SMITH, PROPERTY PROBLEMS, 48.
235. 1 D, PDCB No. 1108; W., TP No. 194; Scottish Law Commission Memo. 25 40-1; SMITH, PROPERTY PROBLEMS 45-52; ATIYAH, SALE 217.
236. *Supra* pp. 350-1.
237. INST. GAI. 2.43.
238. BUCKLAND, TEXT-BOOK 242.
239. *Id.*, 249.
240. *Id.*, 250.
241. *Id.*, 251.
242. *Id.*, 248.
243. Scottish Law Commission Memo. 25 36.
244. Lawson, 65 L.Q.R., 356.
245. *Id.*, 361.
246. Scots courts cannot replace the present system of real and personal rights with the solutions of either the U.S. Uniform Commercial Code (SMITH, PROPERTY PROBLEMS 64-5) or of the Scandinavian law (*id.*, 65-79): such a change requires legislation. 1 KRUSE, THE RIGHT OF PROPERTY 124, of course, declared: "The doctrine of the distinction between *real rights* and *obligatory rights* (rights *in rem* and rights *in personam*) forms one of the most extraordinary chapters in the history of human error"; so that we are talking about different legal systems of rights. For other comment on the deficiencies of the system of real and personal rights: see Macdonald, 31(4) MCGILL L.J. 582 and n. 33, 583 n. 42.
247. "Christianity (like Judaism and Islam) is committed to a monotheistic doctrine of God as absolute in goodness and power and as the creator of the universe *ex nihilo*. The challenge of the fact of evil to this faith has accordingly been formulated as a dilemma. If God is all-powerful, he must be able to prevent evil. If he is all-good, he must want to prevent evil. Yet evil exists. Therefore, God is either not all-powerful or not all-good": J. Hick, *Evil, the Problem of*, in 3 THE ENCYCLOPEDIA OF PHILOSOPHY 136 (P. Edwards (ed.), 1967) and the references at 136-41.
248. a. 1376 CODICE CIVILE 1942.
249. a. 2930 C.C.
250. a. 605 C.P.C. See M. CAPPELLETI & J.M. PERILLO, CIVIL PROCEDURE IN ITALY 333-5 (1965).
251. a. 605 C.P.C.
252. a. 474 C.P.C.
253. a. 605 II C.P.C.
254. a. 607 C.P.C.
255. a. 608 C.P.C.
256. a. 610 C.P.C.
257. a. 611 C.P.C.
258. RABEL, DAS RECHT DES WARENKAUFS 245-6.
259. *Id.*, 245: the list is "*Spanien* C. civ. Art, 1096 Abs. 1, 2, 1124 Abs. 2; C. com. Art. 329; *Portugal* C. civ. Art. 709, 1572; *Argentinien* C. civ. Art. 505, C. com. Art.

- 467; *Brasilien* vgl. C. civ. Art. 1092, C. com. Art. 202; *Chile* C. civ. Art. 1489 Abs. 2, 1826 Abs. 2; C. com. Art. 156; *Bolivien* C. civ. Art. 775 S. 2 Halbs. 2, 1029, vgl. C. com. Art. 322; *Columbien* C. civ. Art. 1546 Abs. 2, 1882 Abs. 2, C. com. Art. 248; *Ecuador* C. civ. Art. 1479 Abs. 2, 1817 Abs. 2, C. com. Art. 198; *Mexico* C. civ. Art. 1949 Abs. 2, C. com. Art. 376; *Peru* C. civ. Art. 1368, C. com. Art. 324; *Uruguay* C. civ. Art. 1431 Abs. 2 S. 2, 1688 Abs. 2, C. com. Art. 534; *Venezuela* C. civ. Art. 1231 Abs. 2, C. com. vgl. Art. 149, 151; *Costa Rica* C. civ. Art. 692 S. 2, 694, 1071, C. com. Art. 101; *Guatemala* C. com. Art. 223; *Honduras* C. civ. Art. 1386 Abs. 2 S. 1; C. com. Art. 101; *Nicaragua* C. civ. Art. 1847, 1885 Abs. 2, 2586; *Panama* C. civ. Art. 1009 Abs. 2; C. com. Art. 754; *Salvador* C. civ. Art. 1360 Abs. 2, 1629 Abs. 2."
260. RABEL, DAS RECHT DES WARENKAUFS 245: the list is "*Spanien* C. enj. civ. Art. 919, 926, 928; *Portugal* C. pr. civ. Art. 899, 808, 900; *Argentinien* C. pr. civ. de la cap. Art. 556; *Brasilien* C. do pr. civ. e com. do dist. fed. Art. 1070; *Chile* C. pr. civ. Art. 237, no. 1, 459 no. 1, 2; *Columbien* C. judicial Art. 870, Ges. 40 v. 1907 Art. 46, Ges. 105 v. 1890 Art. 182; *Ecuador* C. enj. civ. Art. 505, 524; *Uruguay* (Schätzung in juicio summario) C. pr. civ. Art. 509; *Costa Rica* C. pr. civ. Art. 1029, 1031, 1038, 1039, Abs. 2; *Venezuela* C. pr. civ. Art. 792; *Honduras* C. pr. civ. Art. 224, 233 Abs. 2, 452; *Nicaragua* C. pr. civ. Art. 510, 519, 520 Abs. 2, 3."
- 260a. RABEL, DAS RECHT DES WARENKAUFS 246: the list is "*Uruguay* C. pr. civ. Art. 1310, 1311; *Venezuela* C. pr. civ. Art. 792." See, now Galvis, 16 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 437 (1984).
261. Abbot, 40 TUL. L. REV. 340 (1966).
262. T.H. Jackson, *Specific Performance in Louisiana, Past and Future*, in ESSAYS ON THE CIVIL LAW OF OBLIGATIONS 195 (J. Dainow (ed.), 1969).
263. a. 1757; a. 1803 C.C.
264. Jackson, ESSAYS 200.
265. aa. 1905 to 1925 C.C.
266. See, also, a. 1920.
267. a. 1919.
268. a. 2458 C.C.
269. Abbott, 40 TUL. L. REV., 348 and n. 45.
270. Theriot, 60 TUL. L. REV., 1035, 1054 (1986).
271. a. 39 C.P. 1825.
272. a. 308.
273. a. 309.
274. Abbott, 40 TUL. L. REV., 351 n. 57.
275. *Id.*, 362.
276. *Id.*, 344.
277. *Id.*, 344-5.
278. *Id.*, 345 n. 25.
279. Jackson, ESSAYS 202-3.
280. *Id.*, 217.
281. *Id.*, 210.



282. Theriot, 60 TUL. L. REV., 1053-5.

283. *Id.*, 1055.

284. *Id.*, 1055 n. 113.

285. Abbott, 40 TUL. L. REV., 365.

286. Quoted by Herman and Rix, 30 LOYOLA L. REV. 833, 865-6 (1984).

**Chapter 15: The *Esto* Argument: the comparison of Scots Law  
with West German, Swiss, and South African Law**

I now raise an *esto* argument. If ownership does pass, not by the parties' agreement under the Sale of Goods Act 1979, but only when delivery is made, then the pursuer wanting the goods will seek to enforce his contractual right of specific implement. It is submitted that section 1 of the Administration of Justice (Scotland) Act 1972 still provides the machinery with which the courts can prevent the seller's disposing of the *res vendita* in his possession, and ordain the court officer to deliver the goods to the buyer. Section 1 of the 1972 Act refers to civil proceedings that are either already in existence or that are likely to be brought. Proof of a real right of ownership in the goods, though greatly strengthening the buyer's prospects of obtaining the relief under section 1, is not required. He can still press upon the court the urgent importance of a custody order: if, by refusing that order, the court leaves the seller the power to put section 24 of the Sale of Goods Act 1979 into effect, then, no matter how special the goods and how inadequate the damages in lieu of their delivery, the buyer will be confined to damages. Once the goods are in custody, however, if the court orders specific implement then its officer could be ordained to deliver the goods to the pursuer. The snag with the court's decree under section 1(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 is that it depends on the defender's wilful non-compliance with the decree *ad factum praestandum*. If the goods subject to a custody order were returned to the defender so that he could have the opportunity of showing his compliance with the decree *ad factum praestandum*, and the lack of need to make the order under section 1(2), he would be handed on a plate the opportunity of showing his disobedience to the court's decree by putting section 24 of the 1979 Act into effect. To prevent the possible frustration of the custody order and the pursuer's action for specific implement, the court would, it is thought, be wise to exercise its inherent power: just as it may authorize its officers to sign documents and transfer heritage, so it should logically be competent to ordain its officer's delivery of the attached goods to the successful pursuer. The machinery is there; counsel for the pursuer has to persuade the court to use it. To highlight the line of authority represented by Stair, M.P. Brown, Bell, Watt, Linn, and Armour, counsel might draw comparisons with legal systems in which, although ownership does not pass by the sale contract, the buyer's right to specific performance of the sale, even of goods not unique or specially valuable, continues to be accepted in principle: the systems, for example, of West Germany,

Switzerland, and South Africa.

## West German Law

### Background

Dawson showed that German law has long favoured the buyer's claim for delivery.<sup>1</sup> When the distinction between obligations *dare* and obligations *facere* was adopted during the reception of the civil law during the sixteenth century, "the courts agreed ... that the buyer could have specific performance if the asset could be reached by physical seizure";<sup>2</sup> an approach that in essentials subsists today. Obligations *facere* were not generally enforced in the old law.<sup>2</sup>

In the era of codification during the nineteenth century, specific performance was at first viewed as a problem of procedure.<sup>1</sup> In the 1870s the commissioners of the North German Federation distinguished between delegable (*vertretbare*) acts performable by someone other than the defendant, and non-delegable acts depending on his personal intervention or skill. Delegable acts should be exempted from specific enforcement, and the cost of a third-party's performance should, on the French pattern, be charged to the defendant. Non-delegable acts should be compellable, by arrest and fine if necessary, otherwise contumacious defendants could frustrate obligations. Civil imprisonment for debt had been abolished in 1868; the commissioners withheld arrest or fine from money suit, and a deputy of the Reichstag committee in 1875 would have withheld arrest or fine from all civil claims, had not other parliamentarians considered that individual freedom stopped short of wilful disobedience to a court order. The Reichstag's conclusions on specific performance for the delivery of things and the doing of or abstention from acts entered the Civil Procedure Code (*Zivilprozeßordnung* (ZPO)) 1877 as articles 883 to 898. In 1900 the Civil Code (*Bürgerliches Gesetzbuch* (BGB)) brought into effect the principle of article 241: "Kraft des Schuldverhältnisses ist der Gläubiger berechtigt, von dem Schuldner eine Leistung zu fordern. Die Leistung kann auch in einem Unterlassen bestehen."<sup>3</sup>

### Theory of specific performance

The preference of West German law for an action of specific performance over one for damages may be gathered from the congeries of articles in the BGB on impossibility of and delay in performance, and on reparation in kind.

The complicated law of impossibility is outlined by Neitzel:<sup>4</sup>

The Code distinguishes the impossibility of performance which existed at the time when the contract was concluded ("original impossibility")<sup>5</sup> from the impossibility which happened later on ("subsequent impossibility").<sup>6</sup> And the Code further distinguishes between impossibility which is absolute and exists for everybody ("impossibility")<sup>7</sup> and the impossibility which merely exists for the debtor and has its reason in his personal condition ("inability").<sup>8</sup> ... [F]our combinations arise ...: original impossibility, original inability, subsequent impossibility, subsequent inability.

- i) *Original impossibility*. By article 306 BGB a contract for an impossible performance is null. The article should be restrictively interpreted.<sup>9</sup> It admits exceptions:<sup>10</sup> the promisee may demand specific performance if the temporary impossibility can be removed;<sup>11</sup> the defendant may have to pay full reparation for breach of warranty;<sup>12</sup> or, again, he may have to pay if he knew or should have known that the contract was impossible, and the plaintiff did not know or need not have known and he relied on the contract.<sup>13</sup>
- ii) *Original inability*. The contract is valid, the action for specific performance competent.<sup>14</sup> The defendant escapes by showing that he exercised ordinary care in contracting, and so was neither wilful nor negligent.<sup>15</sup>
- iii) *Subsequent impossibility and subsequent inability*. Zweigert and Kötz explain that in cases of subsequent impossibility,<sup>16</sup>

the question is not whether performance was objectively or just subjectively impossible; the important question is who is to blame for the obstacle to performance. If it is the debtor, he is liable to pay damages (§§ 280, 325 BGB); if ... the creditor ..., the debtor is freed and may even be able to demand what was promised to him (§§ 275, 324 BGB); if neither party ..., both are freed (§§ 275, 323 BGB ...).

The important rules on the burden of proof<sup>17</sup> are explained by Szladits:<sup>18</sup>

The prerequisite of the claim for damages is ... that specific performance should have become impossible. The burden of proof of the impossibility is upon the party who relies upon it. Thus, where the promisee sues for performance, it is the debtor who must prove the impossibility, if he relies upon it as a defence, but where the promisee sues directly for damages, it is upon him to prove that the performance has become impossible. This again indicates that the basic right upon which all further remedies depend, and which preceded them, is the claim for specific performance. As a consequence of the shifting of the burden of proof, it seems probable that to sue for specific performance is not only the "primary" remedy, but also the

more advantageous one for the promisee, because not only does the burden of proving impossibility fall upon the defendant, but, even if he sustains this burden, the plaintiff may still substitute a claim for damages.

What happens if performance remains possible but is delayed? The creditor may claim damages besides specific performance.<sup>19</sup> But he may often wish to cancel the contract and claim damages for non-performance; if so, he must usually go further and, by article 326 BGB, set the defaulter on the bilateral contract a reasonable period within which to perform, adding the proviso that thereafter performance will be rejected.<sup>20</sup> Should the debtor remain in default when the period expires, specific performance is excluded, and damages (*Schadenersatz*) and cancellation are allowed. If, because of the delay, though, the creditor has no interest in the performance of the contract, cancellation and damages are his right, without the necessity of setting the period,<sup>21</sup> and he may refuse performance before claiming damages.<sup>22</sup> Zweigert and Kötz state that under the civil law<sup>23</sup>

neither protest nor fixed period for performance is called for in the case of a 'Fixgeschäft,' where a definite period for performance is specified and the judge can infer from the terms of the contract or the surrounding circumstances that the parties intended the transaction to 'stand or fall' depending on whether the time fixed for performance was observed or not.

Has West German law a procedure resembling the "double-barrelled" relief,<sup>24</sup> whereby the judgment creditor may renounce specific performance in favour of damages?<sup>25</sup> Article 283 BGB provides that relief, in terms similar to those of article 326 except for the omission of references to the creditor who lacks interest in the contract, and the addition of a clause that the debtor's obligation to pay damages does not arise if performance becomes impossible as the result of a circumstance for which he is not responsible.<sup>26</sup>

The rules on reparation in kind (*Naturalherstellung*) further demonstrate the legislative favour towards specific relief. Reparation bears a meaning wider than money damages:<sup>27</sup> article 249 BGB on the nature and scope of *Schadenersatz* provides:

Wer zum Schadenersatz verpflichtet ist, hat den Zustand herzustellen, der bestehen würde, wenn der zum Ersatze verpflichtende Umstand nicht eingetreten wäre. Ist wegen Verletzung einer Person oder wegen Beschädigung einer Sache Schadenersatz zu leisten, so kann der Gläubiger statt der Herstellung den dazu erforderlichen Geldbetrag verlangen.

*Naturalherstellung* may therefore secure to the plaintiff what did not exist at the time of the contract.<sup>28</sup> In the telegraphese of the Palandt commentary: "Bei Zerstörg od Nichtlieferrg vertretb Sachen besteht die Naturalrestitution in der Leistg gleichwertiger Sachen (§ 251 Anm 4). Bei unvertretb Sachen kann gleichf ausnw (Zwangsbewirtschaftg, Notzeiten) die Lieferrg einer ErsSache verlangt werden (BayObLG 31, 193, KG JR 48, 282)."<sup>29</sup> Article 251 BGB provides that in so far as reparation in kind is impossible or insufficient for compensating the creditor, the debtor has to compensate him in money; and may do so if reparation in kind is possible only at disproportionate expense. Palandt explains:<sup>30</sup>

Ob die Herstellg unmögl od zur Entsch des Gläub nicht genügend ist, bestimmt sich nach wirtschaftl Gesichtspunkten unter Heranziehg des § 242. Sie war auch bei bezugsbeschränkten od vom Markt verschwundenen Sachen nicht unmögl, da anzunehmen war, daß ein auf Sachersatz gehendes Urt innerh der VerjFrist vollstreckt werden konnte (Hamm SJZ 48, 195, KG JR 48, 282).

*Naturalherstellung* was crucial when currency collapsed, barter became widespread, goods were scarce and money judgments vain in West Germany after World War II.<sup>31</sup>

Under the head of disproportionate expense (article 251 II BGB) falls the case where, instead of an old, damaged, or outworn thing, there is to be delivered something new and far more valuable.<sup>32</sup> The creditor must offer the difference in value, otherwise the debtor can pay him off in money. The money payment may take account of the reduced value of the damaged or destroyed thing, according to the creditor's interest. The creditor who prefers the value not to be considered must place the thing at the debtor's disposal.

Just as a claim<sup>33</sup> or a judgment<sup>34</sup> for specific performance can be ended if the plaintiff prefers damages, so also can the claim to *Naturalherstellung* be ended if he prefers reparation in money and the defendant has not performed in kind by the expiry of the reasonable period set.<sup>35</sup>

Though these outlined rules combine to favour specific performance, scholars suggest that claims for reparation predominate.<sup>36</sup>

## Execution

In the execution of judgments for specific performance, German courts can apply a closely-defined, effective range of measures.<sup>37</sup> For the sale of things the ZPO provides the possibility of seizure and transfer by the legal authorities;<sup>38</sup> for the enforcement of

non-delegable acts, a fine of up to 50,000 DM and imprisonment of up to six months in total;<sup>39</sup> and for the carrying out of delegable acts, authorization of their performance by a third party at the debtor's expense.<sup>40</sup> As this part of my thesis surveys the law on sale of goods, the stress falls on the first category of execution.

Judgments for fungibles-- things which article 91 BGB defines as moveables customarily ascertained in commerce by number, mass, or weight-- receive their enforcement under article 884 ZPO; judgments for non-fungibles certain, corporeal, and existent receive theirs by article 883.<sup>41</sup> Article 883 covers judgments for things which become moveable upon removal by the bailiff who can hand them over<sup>42</sup>-- such, apparently, as growing timber designated by the contract; those for a collection of moveables, such as a library;<sup>42</sup> or those for a tangible certain *corpus* made up of fungibles-- ten tons, say, from X dump.<sup>42</sup> Things yet to be made or acquired under the contract are subject to articles 887 or 888 ZPO, on the enforcement of acts.<sup>43</sup> Article 883 fills the requirements of a plaintiff anxious for the return of what already belongs to him, or to receive what will become his by the *traditio* which West German law prescribes for the transfer of ownership.<sup>44</sup>

Execution is carried out by the bailiff (*Gerichtsvollzieher*),<sup>45</sup> who follows the rules of articles 758 to 763 ZPO.<sup>46</sup> In furtherance of his task, he is empowered to search the debtor's home and receptacles, open doors and windows, and, if encountering resistance, apply force and summon assistance by the police enforcement agency.<sup>47</sup> If he finds the debtor uncooperative, or the debtor and an adult member of his family or an employee absent from the house, the bailiff must provide two adults or one representative from the police or the local government as witnesses.<sup>48</sup> He must take a report of the execution, and mention the time and place of the report; the seized article, with a summary of the essential background; the name of the person he dealt with; that person's signature and a note that the signing occurred after the reading out or presentation for search and after assent; and the bailiff's signature.<sup>49</sup> The bailiff hands the goods to the judgment creditor, securing possession to him and, depending on the facts, ownership,<sup>50</sup> freeing the debtor, and ending the execution, so that if the goods return to the debtor's hand, a new execution title is required.<sup>51</sup> The costs of packing and delivering the goods to the creditor are costs of execution (article 788) if the place of contractual performance differs from that of judgment execution.<sup>52</sup> An interpleader action avails the third-party creditor who does not possess what the debtor holds.<sup>53</sup>

If the search of the debtor's premises proves vain, he may at the creditor's instance be required to declare that he neither possesses the goods nor knows where they

are.<sup>53</sup> The creditor who already knows their location may not demand the debtor's statement but instead can require the assignment, under article 886 ZPO, of the debtor's claim against the third-party possessor.<sup>54</sup> The procedure for making the article 883 declaration is prescribed in articles 889 ZPO and following.<sup>54</sup> The declaration is taken by the clerk of the court.<sup>55</sup> The debtor is cautioned; and details hitherto withheld from the bailiff are recorded on oath, to prevent later retraction.<sup>56</sup> The statement must be sufficiently accurate to facilitate the bailiff's job of execution.<sup>56</sup> After the statement has been made, the creditor can only claim damages under article 893 ZPO, and cannot require the debtor to acquire the goods if there is no judgment for this.<sup>57</sup> Article 883 also applies if the debtor has to produce some thing for review or inspection.<sup>58</sup> Deliberate hindrance of an enforced execution grounds a claim under article 888 for termination of an unlawful state of affairs through issue of an interim interdict.<sup>59</sup>

Fungibles come under article 884 ZPO. If the debtor has to deliver an ascertained quantity of these or securities (*Wertpapiere*),<sup>60</sup> the rule in article 883 I ZPO, on removal and delivery by the bailiff, applies. Article 884 covers goods which have to be delivered for the purposes of transfer of ownership or possession;<sup>61</sup> which have to be acquired or created and then delivered under a contract of work;<sup>62</sup> or goods which have to be delivered to a forwarding agent.<sup>63</sup> The bailiff must determine, if necessary with the aid of an expert (whose fees are costs of execution), whether the debtor possesses the goods to be executed upon, and may remove so much thereof as he finds on the debtor's premises.<sup>64</sup> If the goods are not there, the creditor may not demand a statement on their whereabouts.<sup>65</sup> He is also prevented by article 887 III ZPO from acquiring or creating the goods; unless, as Stein-Jonas observe, the execution title already includes those duties, so that article 887 III is no bar.<sup>66</sup> The creditor cannot threaten the debtor with administrative or execution measures for acquiring or bartering the goods, quite apart from the fact that the claim could not be described accurately enough in the judgment.<sup>67</sup> "Mit der Wegnahme konzentriert sich die Gattungsschuld gemäß § 243 [II] BGB auf die weggenommenen Stücke."<sup>68</sup> An object defined solely by species, and not a fungible, falls outwith article 884; only damages are then exigible.<sup>69</sup>

Article 885 ZPO governs the delivery, surrender, or vacation of an immoveable, or a registered ship or ship construction. The ship may be inhabited or not.<sup>70</sup> Unregistered ships or ship constructions belong under article 883 ZPO.<sup>71</sup>

The bailiff must put the debtor out of, and the debtor into, possession,<sup>72</sup> by force if necessary<sup>73</sup> but without injuring the property.<sup>74</sup> He hands over the power of disposition, the keys, to the creditor, who should, if possible, be present.<sup>75</sup> With the



debtor must go his family and employees;<sup>75</sup> special rules apply to spouses either separated or co-signers of the occupancy agreement.<sup>75</sup> The debtor's moveables which are not subjects of execution the bailiff delivers to or places at the disposal of the debtor or, in his absence, his legal agent, an adult member of his family, or an employee;<sup>76</sup> failing which, the bailiff must impound them at the debtor's expense or arrange for their safe custody in some way,<sup>77</sup> with the third party (through an independent contract in the bailiff's own name) or even with the creditor, where removal of the goods elsewhere is impracticable. Removal and custody costs are costs of the execution.<sup>78</sup>

Goods slow to be claimed by the debtor can be sold at the order of the execution court and the proceeds then deposited.<sup>79</sup> If the debtor is notified that the goods have been placed in custody, his claim is not necessary; but it is delayed if the bailiff has set a reasonable period for removal and accurately stated the costs on payment of which the claim has been made conditional.<sup>80</sup> Even worthless goods may not be destroyed under article 885 II;<sup>81</sup> the sale is decreed so that the bailiff may be released from his custody obligation, and the execution costs are recoverable under article 788 ZPO. Disposal is unlawful if the debtor makes a custody agreement with a warehousekeeper and pays the expenses to date; this behaviour constitutes removal.<sup>82</sup> The decision to order disposal is taken by the clerk of the court,<sup>83</sup> and must be officially notified to both debtor and creditor under article 329 III ZPO.<sup>82</sup>

Articles 894 to 896 ZPO concern the making of a declaration of will (*die Abgabe einer Willenserklärung*) which is exemplified in the transfer of ownership.<sup>84</sup> By article 894 I, the debtor's declaration applies as given once the judgment ordering him to make it acquires legal force; and if this declaration is conditional on counter-performance, the legal effect arises once the executable official copy of the effective judgment is granted. By a statutory fiction, judgment replaces declaration.<sup>85</sup> The judgment needs, therefore, to be competent and appropriate,<sup>86</sup> and cannot supplement the debtor's incapacity to make the declaration.<sup>87</sup> Article 894 chiefly applies to declarations for entries in or erasures from the land, ship, and other such official registers.<sup>88</sup> Article 895 prescribes the law on a judgment provisionally executable. Article 896 assists the creditor who needs a written document mentioned in article 792 on execution title before he can initiate an entry in an official book or register. He, rather than the debtor whose declaration has been replaced by the judgment, can demand the issue of the document. Finally, article 897 provides that if the debtor is adjudged either to the handing over of the ownership of a moveable or to the acquisition of a right to a moveable, the handing over is to be taken as effected if the bailiff removes the thing for the purpose of delivery

to the creditor. "Die Willenserklärung gilt als abgegeben, sobald das Urteil rechtskräftig ist (§ 894 I 4); die Übergabe ist nach § 883 zu erzwingen, sofern sie nicht freiwillig geschieht. Auch dem Gerichtsvollzieher kann freiwillig übergeben werden, § 754; dabei vermittelt er dem Gläubiger Besitz."<sup>89</sup>

### Swiss Law

Like the BGB in West Germany, the *Code des Obligations* in Switzerland assumes specific performance to be the plaintiff's natural choice;<sup>90</sup> while it can be claimed, it should-- an assumption written, as it were, on the page preceding that on which article 97 *alinea* 1 states: "Lorsque le créancier ne peut obtenir l'exécution de l'obligation ou ne peut l'obtenir qu'imparfaitement, le débiteur est tenu de réparer le dommage en résultant, à moins qu'il ne prove qu'aucune faute ne lui est imputable." And the precedence in theory, resembling that expressed in article 326 BGB, is also to be found in article 107 CO, on the debtor's delay:

<sup>1</sup> Lorsque, dans un contract bilatéral, l'une des parties est en demeure, l'autre peut lui fixer ou lui faire fixer par l'autorité compétente un délai convenable pour s'exécuter.

<sup>2</sup> Si l'exécution n'est pas intervenue à l'expiration de ce délai, le droit de la demander et d'actionner en dommages-intérêts pour cause de retard peut toujours être exercé; cependant, le créancier qui en fait la déclaration immédiate peut renoncer à ce droit et réclamer des dommages-intérêts pour cause d'inexécution ou se départir du contrat.

Among the recognized exceptions to the primary remedy of specific performance there is one most interesting: "The court may, under certain circumstances, limit the right of specific performance, if its enforcement would result in a loss to the promisor out of all proportion to the injury caused by his nonperformance, or if it would otherwise be contrary to good faith."<sup>91</sup>

*Obligations de faire* are divided into those performable by someone other than the debtor, and those personal to him.<sup>92</sup> As regards the former, "le créancier peut se faire autoriser à l'exécution aux frais du débiteur."<sup>93</sup> If the seller does not own what cannot therefore be seized by the bailiff, Szladits explains, "the buyer may apply for an authorization, under § 98, to purchase the thing from the actual owner at the expense of the promisor, if he prefers this to a purchase in the open market or damages. In this respect, Swiss law goes further than German law...."<sup>94</sup> An act personal to the debtor is

not specifically enforceable.

"La procédure d'exécution est réglée par la loi fédérale du 11 avril 1889 sur la poursuite pour dettes et la faillite, ainsi que par le droit fédéral et cantonal sur la matière."<sup>95</sup> Though cantonal rules on execution vary, judgments for a specific moveable are usually executed by the bailiff's seizing the thing and delivering it to the creditor.<sup>96</sup>

### South African Law

#### The adequacy of damages as supposed ground for excluding specific performance

In South Africa the aggrieved party has a right to choose specific performance or else damages in lieu thereof. So far as possible, fair, and in accordance with legal and public policy, this election is upheld by the court; but judicial discretion may be exercised to refuse specific performance in appropriate circumstances. Until *Benson* (1986) was decided, the settled law was set out in *Haynes*, where De Villiers A.J.A. held<sup>97</sup> that the

discretion which a Court enjoys although it must be exercised judicially is not confined to specific types of cases, not is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.

As examples of the grounds on which the Courts have exercised their discretion in refusing specific performance, although performance was not impossible, may be mentioned [here I select those bearing on the present topic]: (a) where damages would adequately compensate the plaintiff ...; (b) where the thing claimed can readily be bought elsewhere...; (e) where [an order of specific performance] would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable in all the circumstances.

The judge went on to quote<sup>98</sup> Schreiner J.A. in *R. v. Milne and Erleigh* (7) to the effect that "contracts for the sale of shares which are daily dealt in on the market and can be obtained without difficulty" will seldom be enforced specifically:<sup>99</sup> for which *Thompson v. Pullinger* was cited.<sup>100</sup> Joubert calls this authority "rather skimpy";<sup>101</sup> De Wet and Yeats object that it found no support in the Roman-Dutch common law, and cite two judgments from Van Bynkershoek's *Observationes Tumultuariae*, 1.44. involving cochineal, and 1.227, coffee.<sup>102</sup> To these might be added 1.337 (a legacy), 1.704 (candied peel, though the plaintiff chose damages in the end), 2.1085 (coffee), 2.1189 (cocoa), 2.1420 (an option on whalebones), 2.1461 (wheat), 2.1823 (a partner's share

in a brewery). In *Thompson* Kotzé C.J. referred to his prior judgment in *Cohen v. Shires, McHattie and King*<sup>103</sup> concerning sale of land, where he had decided that the rule *nemo potest praecise cogi ad factum*, though supported by Pothier<sup>104</sup> and Voet,<sup>105</sup> conflicted with the opinions of other jurists such as Huber, Van Leeuwen, and Van der Keessel, and with the current practice in South Africa. In *Thompson* he concluded: "The right of a plaintiff to the specific performance of a contract, where the defendant is in a position to do so, is beyond all doubt."<sup>106</sup> It is therefore strange that this expert in Roman-Dutch law should have cited the United States jurists Story and Parsons for the rule that, as regards transactions in the public funds and also company shares easily obtainable every day on the market, the remedy would be refused.<sup>107</sup> If Kotzé C.J.'s judgment is defended by the remark that, as Hefer J.A. observed in *Benson*, "there is nothing in the writings on Roman-Dutch law about the enforcement by a purchaser of an agreement for the sale of shares,"<sup>108</sup> *Thompson* might be more acceptable as a special exception. But this acceptance has to be withheld, because in *Moffat v. Touyz & Co.*<sup>109</sup> Kotzé, by then Acting Judge President of the Eastern Districts Local Division, took the same approach to enforcing a contractual obligation to return three tins of petrol. Ruling that the magistrate at Mount Fletcher had jurisdiction to grant specific performance, Kotzé A.J.P. held that the Superior Courts' power of granting it, performance being possible, is declined when damages are adequate compensation. "This is in keeping with the principles of the Roman-Dutch law."<sup>110</sup> Then follows a conspectus of authority on obligations to do and give. Excluded from the ambit of the remedy are obligations to sing at a music hall, attend a sale to buy for a principal, to build a house, or paint a picture. More to the point, Kotzé A.J.P. rejected the defendant's exception as to the magistrate's lack of jurisdiction, saying it might well be that<sup>111</sup>

during the scarcity of petrol, due to the war which has only recently come to an end, as was suggested during argument, there is no other petrol obtainable at Mount Fletcher, and that the evidence may show that it will be just and proper that in this case a decree of specific performance should be granted against him. ... At the same time the plaintiff in the court below will be well advised to apply for an amendment of the summons by inserting an alternative prayer for the value of the three tins of petrol.

As this stage of the action was decided on exception, and concerned what the Scots law would term a debate on issues of law,<sup>112</sup> the fact of the defendant's possessing the three tins of petrol was not established, so Kotzé A.J.P.'s advice on the alternative plea was to

that extent prudent. But it is submitted that had delivery of the petrol been possible, then Roman-Dutch law would have required the tins to be delivered to plaintiff claiming them, whether or not petrol was scarce. Perhaps Kotzé A.J.P.'s reference to United States jurists rather than to Van Bynkershoek was a deliberate policy of shifting South African law on the enforcement of shares and fungibles contracts in the direction of Anglo-American law.

The soundness of his authority cannot be tested by the facts of *Farmers' Co-operative Society v. Berry*.<sup>113</sup> The subject-matter, maize, was fungible; but specific performance was ordered because damages were difficult to assess: the contract price was calculated as the number of bags which each member sent the society for disposal, multiplied by "the average nett price obtained by the society calculated over the whole season ..., provision being made for interim advances up to a certain limit."<sup>114</sup> As the defendant seemed to have repudiated the contract before the financial year ended, the "market price" rule, adapted to anticipatory breach, could not be applied with any confidence, owing to the uncertainty over the contract price to be calculated at the end of the year. Although the society failed to prove damages, had not broken any contracts of its own, and had not needed to acquire market substitutes or arrange for them in future, damages were still adjudged hard to assess: specific performance was ordered.

#### Reasons for doubting this ground of exclusion

It is when we look at *Shill v. Milner*<sup>115</sup> that the authority of *Thompson* and *Moffat* on sale of shares and fungibles becomes doubtful. Milner sold Shill maize in August 1934, Shill to be responsible for the export quota under the Mealie Control Act 39 of 1931. Having delivered in November, Milner demanded export certificates corresponding to 1118.5 bags' worth of export quota. The relevant legislation was amended in January 1935. In May, Milner threatened to buy certificates if Shill did not deliver them: a practice had arisen whereby the Department of Agriculture allowed "an exporter, who [had] exported and thus obtained credit for exporting a certain quantity of maize, to transfer his credit to another person. Owing to this practice export quota certificates [could] be purchased in the market."<sup>116</sup> In June, Shill offered damages assessed as the price of the quota certificates undelivered when he became liable. Eventually in December Milner claimed certificates for the 1118.5 bags. Ramsbottom K.C. and Pollak for Shill urged the adequacy of damages on the Appellate Division:<sup>117</sup>

The obligation to deliver unspecified and unascertained quota certificates is indistinguishable from that to deliver stocks or shares. Specific performance of such an obligation is never decreed unless there is no market. See *[C]ud v. Rutter* (24 E.R. 521); *Nutbrown v. Thornton* (10 Ves. Jun. 160 and 32 E.R. 805); *Dorison v. Westbrook* (2 Eq. cases Abr. No. 8, p. 161 and 22 E.R. 137); *Re Schwabacher* (98 L.T. 127) and *Thompson*.... One reason for this rule is that it would be inequitable to decree specific performance. See *Buxton v. Lister* (3 Atkyns at p. 384 and 26 E.R. 1020 at p. 1021).

They failed. De Villiers J.A. applied *Berry* to the facts: the trial judge had wisely exercised his discretion in upholding Milner's choice of specific performance. Tindall A.J.A., with whom Stratford A.C.J. and Feetham A.J.A. concurred, pointed out the parties' common view that Shill could have performed by "buying export quota certificates in the market and transferring to [Milner] the credit thus established in the books of the Department."<sup>118</sup> It was apparently common cause that "if [Shill] could be ordered to transfer purchased certificates, any quota certificates would do."<sup>119</sup> Despite the plea that the certificates were an unspecified, freely-marketable commodity, there were no grounds for impugning the trial judge's exercise of his discretion.<sup>120</sup> As a unanimous decision of the Appellate Division, *Shill* outranks *Thompson* and *Moffat*, and foreshadows the result in *Benson*.

Before 1986 the exact status of Schreiner J.A.'s ruling in *Milne & Erleigh* (7)<sup>121</sup> was uncertain. It was quoted with evident approval in the leading case of *Haynes*. But its authority is weakened by examination of its original setting. Milne and Erleigh were charged with a number of crimes of dishonesty; Schreiner J.A.'s remarks relate to count 22, the alleged theft of some profits earned by New Union Goldfields Ltd. on shares in the Rooderand Company. The headnote on charge 22 reads:<sup>122</sup>

The directors of the N.U.G. Company had agreed to subscribe for 750,000 shares in the Rooderand Company-- a company in which the second appellant was a director. It was resolved that of these shares one third would be allocated to the associate companies of the N.U.G., one third to the second appellant and that the N.U.G. would retain the balance. N.U.G. paid for all the shares and the second appellant at no time demanded delivery of his shares nor did he agree to pay for them. It appeared that N.U.G. had sold all but 161,824 of the shares, and that it had been credited with the sales. In order to satisfy the second appellant's claim, the first appellant instructed one B[ayliss], who was in charge of the secretarial, accounts and securities department of N.U.G., to credit the second appellant and himself with a sum representing the difference between the purchase price of the shares by the second appellant and the average profits earned by N.U.G. in its dealings with the shares. B agreed to this as he was of the opinion that it would be more advantageous to

N.U.G. than to go into the open market to buy the balance of shares due to the second appellant. In an appeal from a conviction for theft of portion of the profits so earned by N.U.G.

*Held, per* CENTLIVRES, C.J. (GREENBERG, J.A., concurring) that the arrangement was one of which an honest board might have approved.

*Held, further, per* CENTLIVRES, C.J. (GREENBERG, J.A., concurring) that in the circumstances the taking of the money by the appellants did not amount to theft.

*Held, per* Schreiner, J.A., since it was by their own acts that appellants had put the N.U.G. into the position of being unable to deliver the shares, that no Court would have granted specific performance against N.U.G. and the most which they as business men would realise they would have been entitled to would have been damages calculated at the market price on the date when the only thing which could in any sense have been called a demand was made; accordingly co-appellant knew that the official had no right to make any settlement with him in relation to the claim, was not honest in appropriating these profits instead of laying the matter before the board, and could not have believed that an honest board in possession of the facts would have approved the transaction.

On count 22 Schreiner J.A. disagreed with the majority (Centlivres C.J. and Greenberg J.A.).<sup>123</sup> His decision cannot represent the *ratio decidendi* of this part of the case. He held that the court would have refused Milner and Erleigh's claim for specific delivery of the shares, if the seller company "could only perform by re-buying on the market at an inordinate price."<sup>124</sup>

Centlivres C.J. took a radically different view of the accuseds' behaviour, and of the delivery of the shares, as the following passages show:

Assuming, as must be assumed, that Milne and Bayliss believed that Erleigh's purchase of the shares was a valid purchase, the settlement according to law, subject to the contention of Mr. *Williamson* with which I shall deal later, would have been a delivery to him of the shares or, if Erleigh chose to claim damages, payment of the difference between the market price and the contract price.<sup>125</sup>

*Prima facie*, as Erleigh had bought the shares, as the sale had not been cancelled and his claim was not prescribed, there could have been no defence to his claim for delivery of the shares, or for delivery and alternatively damages. ... Erleigh's conduct did not make it impossible for the company to deliver the shares as there was nothing to prevent it from buying enough shares elsewhere to enable it to make delivery, and it may well be that the only use that the company could make of Erleigh's "fault" was a claim for

damages, if his conduct had caused damages to the company.<sup>126</sup>

The Chief Justice, by holding the accuseds' arrangements reasonable, exonerated them from the fault which might have been a defence to a claim for specific delivery of the shares. These passages, therefore, less noticeable than Schreiner J.A.'s compact, citation-studded ruling, nevertheless constitute the *ratio decidendi* of the case, so far as specific performance is concerned. Schreiner J.A.'s ruling, because it related to shares, remained an *obiter dictum* in *Haynes*, where the appellant's claim for specific performance of a contract to deliver water from the Maden Dam was refused on the grounds of public policy: the appellant had alternative sources of supply from the bed of the Buffalo River and from the Tyusha stream;<sup>127</sup> and the Municipality's compliance with the contract during an unprecedented drought, when the dam level had sunk dangerously low and water restrictions were in force, would have caused hardship, danger, and disruption to the Kingwilliamstown community, to which the Municipality owed a public duty of adequate water supply.<sup>128</sup>

Further proof that specific delivery of shares will be decreed, rather than damages for market substitutes, comes implicitly from *Dublin v. Diner*.<sup>129</sup> Milne J.P. ordered, *inter alia*, that on Diner's performing his contractual obligations, Dublin should deliver to him 26,250 ordinary shares of R2 nominal value in Benoz (Pty.) Ltd. and the share transfer forms signed in blank by Dublin; and also deliver to the Johannesburg attorneys, Werksmans, 7,000 ordinary shares of R2 nominal value in Regina Manufacturers (Pty.) Ltd., the share certificates signed in blank by Dublin, and his written instructions for the terms of delivery of the shares to Diner.<sup>130</sup> Milne J.P. had referred to *Berry; Woods v. Walters*;<sup>131</sup> *Milner and Erleigh (7)*;<sup>132</sup> and *Haynes*;<sup>133</sup> and then distinguished *Dublin v. Diner* from *Pouget v. Ramlakan*.<sup>134</sup> The present parties not being "tender hot-house plants ... but hard-headed business men"<sup>135</sup> he decided that it would not be an unreasonable hardship for Dublin to have Diner as a minority shareholder.

*Kazazis v. Georgiades en Andere*<sup>136</sup> involved a double sale of shares, the second buyer having known of the prior sale to the applicant and of his intention to enforce his contractual rights. The shares had already been delivered to the second buyer, who was interdicted by the court from disposing of them to anyone other than the applicant, pending the decision of the applicant's action for their delivery. Though the second buyer was privy to the seller's fraud, it is yet significant that the court did not leave the first buyer to his remedy in damages (on the basis that specific performance would not



have been granted anyway) and refuse his application for interdict.

So, if one takes the view that the common law is deduced from what the judges do rather than from what they say, then the line of decisions formed by *Shill*, the majority judgment in *Milne and Erleigh* (7), *Diner*, and *Kazazis* represents the South African law on specific performance of share sales before 1986. Contrary pronouncements were either outranked, ignored, or applied in such a way that the damages adequacy rule was excluded.

**Benson v. S.A. Mutual Life Assurance Society: restatement of the law**

*Benson*<sup>137</sup> restated the law of specific performance in forthright terms. The decision has been welcomed by two commentators.<sup>138</sup> In August 1982 Benson sold the Society 171,500 ordinary shares in the McCarthy Group Ltd. at R2.10 each; 107,900 were delivered, and the Society claimed specific delivery of the remaining 63,600, together with damages for loss of dividend. Benson pleaded that when the Society had known, by 4 September at latest, that the shares would not be delivered, it should have bought in replacements which were daily traded on the market, easily obtainable, for under R2.10 each. An order for specific delivery would therefore be inequitable and unconscionable. Further, prompt mitigation of loss would have prevented forfeiture of dividends. Schock J. in the Cape Provincial Division had granted specific performance.

In the part of the judgment relating to shares, Hefer J.A. held that though their precise availability was uncertain here, he would decide the case on the assumption that they had been so available;<sup>139</sup> an assumption which laid the ground for a direct challenge to the rule based on damages adequacy and "market price" assessment of damages. He disapproved of the propositions that specific performance will be refused (1) if damages suffice;<sup>140</sup> (2) if the ordinary goods sold are purchasable anywhere;<sup>141</sup> and (3) if the shares sold are traded in the market every day and are easily obtainable.<sup>142</sup> All three rules, well known in English law, limited the court's discretion and the plaintiff's clear right to specific performance. The first negated,<sup>143</sup> the second rendered nugatory,<sup>144</sup> the plaintiff's choice of relief. More fundamentally, Kotzé C.J.'s references in *Thompson* to English law (though the jurists were American, the distinction is immaterial) set the South African law on an incorrect footing. Hefer J.A.'s words might, with suitable amendments, be quoted by a Scots court anxious to overrule the line of authority represented by *Sutherland*, *Davidson*, and *Union Electric*, and to re-establish the supremacy of *Stair*, *Brown*, *Watt*, and *Linn*:<sup>145</sup>

Now, although it is by no means uncommon for the Courts to explore other comparable systems of law in cases where the Roman-Dutch authorities are silent upon a particular point, and although there can be no objection to such an excursion if its purpose is to seek guidance and no more, the reference in *Thompson's* case to English law on the subject of specific performance was particularly unfortunate. Its result was that, whereas the substance of the law relating to the specific performance of contracts was sought and discovered in the Roman-Dutch authorities, English law became the practical source of its application. Had the two systems of law been compatible on the subject on which they thus became married, there could have been no objection. But they are not. I have already dealt fairly extensively with a plaintiff's right according to South African law to demand performance and referred to the fact that the courts will as far as possible give effect to that right. That is not the position in England. At common law a plaintiff has no right to demand performance; his only remedy is a claim for damages (cf Benjamin *Sale of Goods* 2nd ed para 1447; Fry *Specific Performance of Contracts* 5th ed paras 7 and 11). Specific performance is a form of equitable relief which could originally only be obtained in the Court of Chancery in accordance with well-defined rules. (Snell *Principles of Equity* 27th ed at 573; Odgers *The Common Law of England* vol 2 at 1156.) The most important rule, from which many of the others derived, was that specific performance would not be granted where the plaintiff could be compensated adequately by damages. It would thus appear that even in the Court of Chancery the emphasis fell on damages and that an order for specific performance was the exception rather than the rule (Cf *Baragwanath v Olifants Asbestos Co Ltd* 1951 (3) SA 222 (T) at 228.)

Despite this distinctly different approach, rules deriving purely from Chancery practice were applied in South Africa not only in *Thompson* ... but in a number of other cases. Some of our textbook writers, particularly the older ones, naturally followed suit. (Cf *Wessels* ... paras 3113-3138...) and so it came about that English cases came to be followed somewhat indiscriminately without noticeable regard to the fundamentally different approach which the Courts in England adopt when it comes to the exercise of the discretion to order performance. There is not need nor reason for this process to continue.

This does obviously not imply that there is to be no reference on the subject to English law or to some other system of law or that factors which other Courts have considered to be obstacles or possible obstacles in the way of granting an order for specific performance now cease to be pertinent. On the contrary, they remain relevant factors which are to be considered on the same basis as any other relevant fact is to be considered.

The conclusion is that English cases can be used in aid of the South African-- or the Scots-- law of specific enforcement of contracts, but should not be followed in such a way that the principles traditionally favouring the remedy are deprived of their strength.

The trial court had exercised its judicial discretion to order specific performance despite the availability of market substitutes; the Appellate Division would not interfere.<sup>146</sup> Impossibility of performance failed as a defence: Benson had bought but not received the 171,500 shares at the time when he resold them to the Society; but the

trial court held that the sale was generic, not limited to those particular shares. The mitigation rule did not apply; the Society did not have to cancel the purchase and go into the market.<sup>147</sup>

### Execution

The execution of orders for specific performance in South Africa is carried out by various means. For orders relating to goods sold, the ultimate sanction is imprisonment for contempt of court at the instance of the judgment creditor,<sup>148</sup> on the grounds that the judgment debtor's disobedience of the court order intentionally and unlawfully violates the court's dignity, repute, or authority. The imprisonment is often suspended by the court on condition that the defendant-accused obeys the order. In *Protea Holdings Ltd v. Wriwt and Another*,<sup>149</sup> where the respondents had disobeyed an interdict in a restraint-of-trade case, the court sentenced each to a R1,000 fine and, failing payment, a month's imprisonment, together with a further two months' imprisonment suspended on condition that certain terms were obeyed.

Where the defendant's obligations can be performed by court officers, his participation is dispensed with. Documents can be signed, transfer entries in the Deeds Register made,<sup>150</sup> property attached and (if moveable) delivered<sup>151</sup> or (if immoveable) transferred to the judgment creditor.<sup>152</sup> So in *Lilienfeld & Co. v. Riviera*<sup>153</sup> after the buyer had broken his obligation to pay cash for the goods delivered, Innes C.J. ordered the sheriff to attach the goods and return them to the sellers. The buyer was allowed to raise an action for redelivery and damages if he could prove his allegations of a sale on credit. The sellers were held to have retained *dominium*; but this right is not a requirement for a court order of seizure and delivery. In *Berry*, one of the reasons given by the trial judge, Watermeyer J., for refusing specific performance was that "the prayer seeks for no identified article but generally for 1,200 bags of mealies-- there is no evidence that there are any specially identified 1,200 bags in existence which the officer of the Court could seize."<sup>154</sup> Though Watermeyer J.'s decision was reversed, the Appellate Division did not hold that seizure of the goods by the sheriff was unlawful. In South African law the buyer who has yet to receive delivery cannot be the owner of the goods. So Watermeyer's adumbration, when related to the case of the buyer who prefers specific delivery to damages, should entitle him to ask for the goods to be seized. Likewise, even if the Scots buyer to whom property has passed under the Sale of Goods Act 1979 is not the owner of the undelivered goods, he should be able to urge the court to grant a custody order to the messenger at arms or sheriff officer under section 1 of

the Administration of Justice (Scotland) Act 1972.

### Notes

1. Dawson, 57 MICH. L. REV. 495, 525-7 (1959).
2. *Id.*, 525.
3. RABEL, DAS RECHT DES WARENKAUFS 146.
4. Neitzel, 22 HARV. L. REV. 161, 166 (1909). *See*, also, N. HORN, H. KÖTZ, & H.G. LESER, GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 96-101 (1982); 2 K. ZWEIGERT & H. KÖTZ, INTRODUCTION TO COMPARATIVE LAW 179-83, 211-7 (2d ed. tr. by T. Weir, 1987).
5. "Ursprüngliche (anfängliche) Unmöglichkeit": *see* PALANDT, BGB 312 (P. Bassenge *et al.* (eds.), 45 Aufl. 1986).
6. "Nachfolgende (nachträgliche) Unmöglichkeit": *id.*, 312.
7. "Unmöglichkeit": *id.*, 311.
8. "Unvermögen": *id.*, 311, 312.
9. 2 ZWEIGERT & KÖTZ, INTRODUCTION 180-1.
10. Neitzel, 22 HARV. L. REV., 166-7.
11. § 308 BGB.
12. Neitzel, 22 HARV. L. REV., 166 and n. 4; § 437 BGB; 2 ZWEIGERT & KÖTZ, INTRODUCTION 179-80.
13. § 307 BGB.
14. Neitzel, 22 HARV. L. REV., 167 and n. 3; PALANDT, BGB 363-4; 2 ZWEIGERT & KÖTZ, INTRODUCTION 180; 2 MÜNCHENER KOMMENTAR § 306 RdNmr 2 (hence MK); BGB-REICHSGERICHTSRÄTEKOMMENTAR § 306 RdNmr 13 (hence BGB-RGRK).
15. § 276 BGB.
16. 2 ZWEIGERT & KÖTZ, INTRODUCTION 181.
17. PALANDT, BGB 340: "§ 282 gilt für die nachträgl Unmöglichk u das nachträgl Unvermögen." *See*, also, MK § 282 RdNmr 4.
18. Szladits, 4 A.J.C.L. 208, 222 (1955).
19. HORN, KÖTZ, & LESER, GERMAN PRIVATE LAW 103; 2 ZWEIGERT & KÖTZ, INTRODUCTION 183-5; PALANDT, BGB 393.
20. HORN, KÖTZ, & LESER, GERMAN PRIVATE LAW 103-4; Neitzel, 22 HARV. L. REV., 170 and n. 5; MK § 326 RdNmr 1: "Thren Grund findet die ganze Regelung letztlich in dem vom BGB mit so großem Nachdruck betonten Prinzip des Vorrangs der Naturalerfüllung vor der Vertragsliquiderung. Auf demselben Grundgedanken beruhen außerdem namentlich noch die §§ 283, 542, 634, und 636."
21. § 326 II BGB. *See* HORN, KÖTZ, & LESER, GERMAN PRIVATE LAW 104; 2 ZWEIGERT & KÖTZ, INTRODUCTION 184 for examples of seasonal goods.

22. § 286 II BGB; PALANDT, BGB 348.
23. 2 ZWEIGERT & KÖTZ, INTRODUCTION 184. *See, also, RABEL, DAS RECHT DES WARENKAUFS* 161. For the commercial-law rule, *see, § 376 HGB.*
24. "Double-barrelled relief": *Ager v. Hitchcock* 1950 (3) S.A. 372 (D) 375.
25. *Note* that § 326 BGB could meet the creditor's needs: BGB-RGRK § 326 RdNmr 3: "... sogar [der Gläubiger] schon ein rechtskräftiges Leistungsurteil erstritten hat (RGZ 102 264; RG LZ 25 258) ...."
26. BGB-RGRK § 326 RdNmr 16: "Der Schuldner gerat nicht in Verzug, solange die Leistung infolge eines Umstandes unterbleibt, den er nicht zu vertreten hat (§ 285)." On § 283 BGB, *see, also, Neitzel, 22 HARV. L. REV., 170 and n. 1; 2 ZWEIGERT & KÖTZ, INTRODUCTION 161.*
27. Treitel, VII I.E.C.L. ch. 16 10. Szladits calls it "merely another type of specific performance": 4 A.J.C.L., 224. German reparation can take a non-pecuniary as well as a pecuniary form: 4 A.J.C.L., 225 and n. 77; MK § 249 RdNmr 1, 3.
28. RGZ 165 260, 270; Szladits, 4 A.J.C.L., 224-5 and n. 76; RG 131 178; PALANDT, BGB 265; RG 143 267, 274; BGB-RGRK § 249 RdNmr 1; MK § 249 RdNmr 3.
29. PALANDT, BGB 265. *See, also, Neitzel, 22 HARV. L. REV., 177 and n. 6; MK § 249 RdNmr 3.*
30. PALANDT, BGB 274.
31. L. ENNECCERUS, RECHT DER SCHULDVERHÄLTNISSE 92 (15. Bearbeitung von H. Lehmann, 1958) (hence Enneccerus-Lehmann); Dawson, 57 MICH. L. REV., 531-2 and n. 96; 2 ZWEIGERT & KÖTZ, INTRODUCTION 160.
32. ENNECCERUS-LEHMANN 91-2.
33. § 326 BGB.
34. § 283 BGB.
35. § 250 BGB; MK § 250 RdNmr 1; BGB-RGRK § 250 RdNmr 1.
36. Szladits, 4 A.J.C.L., 221, 224 n. 73; Dawson, 57 MICH. L. REV., 530, 532; 2 ZWEIGERT & KÖTZ, INTRODUCTION 161.
37. Dawson, 57 MICH. L. REV., 527-8, 530-1 (problems of this delimitation), 533; Jackson, 24 TUL. L. REV., 417-8.
38. §§ 883-6 ZPO.
39. § 888 ZPO.
40. § 887 ZPO.
41. A. BAUMBACH & W. LAUTERBACH, ZIVILPROZEßORDNUNG 1535 (nunmehr verfaßt von J. Albers und P. Hartmann, 39. Aufl., 1981) (hence B-L); 3 STEIN-JONAS, KOMMENTAR ZUR ZIVILPROZEßORDNUNG § 883 Anm. I and I.3. (Bearbeitet seit 1953 von R. Pohle, seit 1967 fortgeführt von ... W. Munzberg, 19. Aufl., 1975) (hence S-J).
42. B-L 1535; S-J § 883 Anm. I.3.
43. B-L 1535.
44. B-L 1535; S-J § 883 Anm. I.1.a).
45. §§ 154, 155 Gerichtsverfassungsgesetz 1877.

46. B-L 1535; S-J § 883 ZPO Anm. II.
47. § 758 ZPO.
48. § 759 ZPO.
49. § 762 ZPO.
50. *Cf.*, § 897 I ZPO.
51. S-J § 883 Anm. II; B-L 1535.
52. S-J § 883 Anm. II; B-L 1535; § 788 ZPO.
53. § 883 II ZPO.
54. B-L 1535; S-J § 883 Anm. IV.
55. § 20 Nr. 17 Rechtspflegergesetz; B-L 1536; S-J § 883 Anm. IV.
56. S-J § 883 Anm. IV.
57. S-J § 883 Anm. IV.; B-L 1536.
58. B-L 1536, qualified by S-J § 883 Anm. I.1.e).
59. B-L 1536.
60. "Wertpapiere" could also be translated as "transferable documents of value."
61. S-J § 884 Anm. I.
62. § 651 BGB; S-J § 884 ZPO Anm. I.; B-L 1537.
63. B-L 1537.
64. S-J § 884 Anm. I.; B-L 1537.
65. § 884 does not refer to § II ZPO: S-J § 884 Anm. I.
66. S-J § 884 Anm. IV., contradicting the bare statement in B-L 1537: "Auch die §§ 887, 888 sind unanwendbar, § 887 III."
67. B-L 1537.
68. S-J § 884 Anm. I.; B-L 1537. HORN, KÖTZ, & LESER, GERMAN PRIVATE LAW 91 state that the generic obligation ("Gattungsschuld") is "certainly the commonest form of contract today," and that the obligation concerning specific goods ("Stückschuld"), where the exact subject-matter has been identified from the outset, is today confined mostly to "dealings in real property, in the art and antique trade, and in second-hand goods, especially motor cars."
69. S-J § 884 Anm. II.
70. B-L 1537.
71. B-L 1537; S-J § 885 Anm. II.
72. § 885 I ZPO.
73. § 758 III ZPO; B-L 1538; S-J § 885 Anm. I.
74. B-L 1538.
75. B-L 1538; S-J § 885 Anm. I.
76. § 885 II ZPO; S-J 885 Anm. II.1.
77. § 885 III ZPO; S-J § Anm. II.2.
78. §§ 3 Nr. 1, 2; § 35 Nr. 8 Gerichtsvollzieherkostengesetz; S-J § 885 Anm. II.3.
79. § 885 IV ZPO.
80. S-J § 885 Anm. III.

81. *Id.*, and n. 69, contradicting B-L 1539: "Die Vernichtung kommt allenfalls in Betracht, wenn das Räumungsgut unverkäuflich ist, zB wenn es sich um bloßes Gerümpel handelt, LG Düss ZMR 78, 288, LG Karlsru DGVZ 80, 14, AG Bln-Neukölln DGVZ 80, 42."
82. S-J § 885 Anm. III.
83. § 20 Nr. 17 RPflegerG; S-J § 885 Anm. III.
84. § 929 BGB (moveables); § 925 (land: formal agreement), § 873 BGB (entry in land register); WAELBROECK, TRANSFER 31 *et seq.*; HORN, KÖTZ, & LESER, GERMAN PRIVATE LAW 69-70, 74-5 (declaration of will), 170.
85. S-J § 894 Anm. I.; B-L 1561: "§ 894 ersetzt den Zwang durch eine reine Unterstellung."
86. S-J § 894 Anm. I.1.4.
87. *Id.*, Anm. II.
88. *Id.*, Anm. I.2.
89. S-J § 897 Anm. I.1. See, also, B-L 1564.
90. Friedmann, 19 Z.S.R. 48, 51 (1900); P. ENGEL, TRAITÉ DES OBLIGATIONS EN DROIT SUISSE 471 (1973); E. BUCHER, SCHWEIZERISCHES OBLIGATIONENRECHT 293, 296 (1979); Szladits, 4 A.J.C.L., 228.
91. Szladits, 4 A.J.C.L., 229 and n. 99; BUCHER, SCHWEIZ. OBLIG. 269 n. 9.
92. T. GUHL, DAS SCHWEIZERISCHES OBLIGATIONENRECHT 61, 63 (6. Aufl., 1972); ENGEL, TRAITÉ 473-4; BUCHER, SCHWEIZ. OBLIG. 296-7; Szladits, 4 A.J.C.L., 229-30.
93. a. 98 *al.* 1 C.O.
94. Szladits, 4 A.J.C.L., 230 n. 104.
95. a. 97 *al.* 2 C.O.
96. Szladits, 4 A.J.C.L. 231 and n. 112; BUCHER, SCHWEIZ. OBLIG. 295 and n. 6; ENGEL, TRAITÉ 473; GUHL, DAS SCHWEIZ. OBLIG. 62; RABEL, DAS RECHT DES WARENKAUFS 189.
97. 1951 (2) S.A. 371 (A) 378F-379A.
98. *Id.*, 379A-C.
99. 1951 (1) S.A. 791 (A) 873H-874A.
100. (1894) 1 Official Reports 298, 301.
101. 5 JOUBERT, THE LAW OF SOUTH AFRICA 148.
102. DE WET & YEATS, KONTRAKTEREG 190 and n. 72.
103. (1882) 1 S.A.R. 40, 48.
104. POTHIER, OBLIGATIONS § 157.
105. VOET, COMMENTARIUS 19.1.14.
106. *Thompson*, 1 O.R., 301; followed in *Berry*, 1912 A.D., 350 *per* Innes J.
107. *Thompson*, 1 O.R., 301: "(2 Story, Eq. § 717, a; 3 Parsons on Contract, part 2. Division 2, s. 3)". Kotzé C.J. could not have cited VAN BYNKERSHOEK, ORS TUM.: this was only published this century: HAHLO & KAHN, SOUTH AFRICAN LEGAL SYSTEM 557-8.
108. 1986 (1) S.A., 784H.
109. 1918 E.D.L. 316.

110. *Id.*, 319.
111. *Id.*, 320.
112. WALKER, SCOTTISH LEGAL SYSTEM 462, 464.
113. 1912 A.D. 343.
114. *Id.*, 348.
115. 1937 A.D. 101.
116. *Id.*, 107.
117. *Id.*, 103.
118. *Id.*, 110.
119. *Id.*, 111.
120. *Id.*, 112.
121. *Milne and Erleigh* (7), 1951 (1) S.A., 873H-874A; *Haynes*, 1951 (2) S.A., 379.
122. *Milne and Erleigh* (7), 1951 (1) S.A., 794-5.
123. *Id.*, 1951 (1) S.A., 872D-E.
124. *Id.*, 874A.
125. *Id.*, 852B-C.
126. *Id.*, 853A-C.
127. *Haynes*, 1951 (2) S.A., 377-8 *per* Gardner J.P., read with the evidence summarized at 376F, 377B, E.
128. *Id.*, 381B-D *per* De Villiers A.J.A.
129. 1962 (4) S.A. 36 (N).
130. *Id.*, 42A-D.
131. 1921 A.D. 303, 309.
132. 1951 (1) S.A., 873-4.
133. 1951 (2) S.A., 378.
134. 1961 (2) S.A. 163 (N).
135. *Dublin*, 1962 (4) S.A., 41A.
136. 1979 (3) S.A. 886 (T).
137. 1986 (1) S.A. 776 (A).
138. McLennan, 103 S.A.L.J. 522 (1986) more cautiously than Beck, 16 BUSINESSMAN'S LAW 105 (1987); 20 C.I.L.S.A. 190 (1987).
139. *Benson*, 1986 (1) S.A., 783H-I.
140. *Id.*, 783I-J, 784E; WESSELS, LAW OF CONTRACT para. 3136.
141. 1986 (1) S.A., 783J-784A, 784E; WESSELS, LAW OF CONTRACT para. 3137.
142. 1986 (1) S.A., 784A-B, E; *Thompson*, 1 O.R., 301; *Milne and Erleigh* (7), 1951 (1) S.A., 873.
143. 1986 (1) S.A., 784C, citing *Swartz & Sons (Pty.) Ltd. v. Wolmaransstad Town Council* 1960 (2) S.A. 1 (T) 3, *per* Hiemstra J.
144. 1986 (1) S.A., 784D, citing DE WET & YEATS, KONTRAKTEREG 190.
145. 1986 (1) S.A., 784H-785G.
146. 1986 (1) S.A., 785G-H.



147. 1986 (1) S.A., 785I-786B.
148. S. v. Beyers 1968 (3) S.A. 70 (A); 2 P.M.A. HUNT, SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE: COMMON-LAW CRIMES 197-8 (1970); HERBSTEIN & VAN WINSEN, CIVIL PRACTICE ch. XL; 6 JOUBERT, THE LAW OF SOUTH AFRICA paras. 189, 202. On specific performance: Shakinovsky v. Lawson & Smulowitz 1904 T.S. 326, 331; Van der Byl v. Hanbury (1882) 2 S.C. 80, 81; Van der Westhuizen v. Velenski (1898) 15 S.C. 237; Rogers v. Jonker 1931 E.D.L. 178.
149. 1978 (3) S.A. 865 (W).
150. De Villiers and De Villers v. Meyer's Executrix 1907 T.S. 519.
151. Lilienfeld & Co. v. Riviera 1908 T.S. 410; *Van der Byl*, 2 S.C., 82 *per* De Villiers C.J.
152. *Van der Byl*, 2 S.C. 80 (sheriff); Trollip v. Tromp and Van Zweel (Master); *Rogers*, 1931 E.D.L., 179 (Deputy Sheriff of Port Elizabeth to do the necessary acts and sign the necessary papers to transfer immoveable property if the imprisoned contemnor had still not complied with the order after four weeks).
153. *Riviera*, 1908 T.S. 410.
154. *Berry*, 1912 A.D., 346.

## Chapter 16: Conclusions for Scots law on the sale of goods

The key words determining how far section 52 of the Sale of Goods Act 1979 supplements but does not derogate from the Scots law of specific implement are "specific or ascertained." "Specific goods" are those identified or agreed on at the time when a contract of sale is made.<sup>1</sup> "Ascertained goods," nowhere defined by the Act, were held by Atkin L.J. in *Re Wait* to mean those "identified in accordance with the agreement after the time a contract of sale is made."<sup>2</sup> The adjective "specific" entered the background history of the Sale of Goods Act 1893 in section 1 of the Mercantile Law Amendment Act 1856;<sup>3</sup> although the Common Law Procedure Act 1854 had gone some way to remedying one of the deficiencies of detinue, the Commission wished to extend the power of the English and Irish courts of common law to grant specific relief, and looked at the Scots law of specific implement for comparison, a remedy which related to a specific thing. Other contemporary sources confirm the element of particularity of the goods identified to the contract in such a way that the *emptio* was *perfecta*.<sup>4</sup> The adjective was a convenient means of harmonizing British law, for it also featured in the old English common law of detinue, by which the action and judgment demanded and ordered the return of a particular, identified thing or its money value; this was the deficiency of specific relief at law which the 1854 Act had begun to supplement, because hitherto only things so specific as to be unique or to excite in the plaintiff a *pretium affectionis* inadequately reflected by damages would be specifically restored or delivered, according to the principles of equity which were developed to supplement the deficiency of specific relief at law. The action of detinue and the device of constructive delivery had been used by the common law courts in winning support for the idea that the contract of sale might operate as a conveyance of the property in the goods. The actions of debt and detinue were subsequently overshadowed by the two tortious actions of trover and conversion, and *assumpsit*, the latter shaping much of the modern English law of contract. Yet the idea of the sale-of-goods contract as conveyance endured, and, with its roots in the detinue action, its modern expression in sections 16 to 18 of the 1979 Act continues to employ the adjective "specific." The impression of Scots lawyers that the 1893 Act had revolutionized Scots common law by facilitating the passing of ownership by agreement alone, without delivery either real or fictitious,<sup>5</sup> led me to ask why a pursuer, now *dominus* by the sale, would rely on a personal action of specific implement when he might also bring the more powerful real action of *rei vindicatio*. The relevant articles of the French *Code civil* and their derivatives in the systems of

Belgium, Italy, Spain, Portugal, and Louisiana, together with an outline of the conservatory attachment provided by the French *saisie-revendication* pending the *action en revendication*, all encourage a comparative search for Scots analogues. The actions of *spuilzie* and restitution enable the pursuer to demand the return of his property, and, being real, exclude the judicial discretion to refuse the personal action of specific implement on the grounds that damages suffice. A conservatory attachment is possible, in the court's discretion, under section 1 of the Administration of Justice (Scotland) Act 1972; a discretion which the courts would be urged to exercise in favour of the *dominus* who would lose his right if section 24 of the Sale of Goods Act 1979 were left to operate.

As disagreement subsists whether the buyer becomes owner of the goods without delivery, one has to argue for the buyer's right to delivery of the goods by way of the personal action of specific implement. *Obiter dicta* in *Sutherland, Davidson, and Union Electric* align Scots law with English equity in limiting specific relief to unique or specially valuable goods. On this narrow basis the decree of the Scots remedy is undoubtedly competent.

A wider basis for competent decree, however, is urged by section 52 of the 1979 Act and by a different line of Scots authority represented by *Stair, M.P. Brown, Watt, Howie, Dixon v. Bovill, Bell, Linn, and Armour*. Once the goods sold have been identified to the contract, then, whether unique or readily available on the market, they come within the sphere of the remedy, subject to the court's discretion of refusal in circumstances of unfairness or hardship. This wider basis is further supported by the general principles on the pursuer's election of remedies, whether for specific relief or damages in lieu thereof, as confirmed in *Stewart* and also by comparison with South African law on the difference between the claim for "specific performance, failing which, damages" and the claim for "specific performance or, alternatively, damages." This comparison pointed to the need for judicial or administrative control of the former kind of claim, if the innocent cessionary of a judgment for the first part is not to be defrauded by the judgment creditor who has switched to the second part. The comparison also showed that the date for assessing damages under the "double-barrelled" relief is the date when the contract is cancelled, not the date when the original breach occurred. The *prima facie* rule on damages in section 51(3) of the Sale of Goods Act 1979 refers to the date of breach; the South African authority could, however, be used by Scots lawyers arguing that in claims for specific implement, failing which, damages, the *prima facie* rule is displaced by a rule that logically relates damages assessment to the

date of contract cancellation. And if specific implement is accepted as the buyer's ordinary remedy, the *prima facie* rule, though suitable for England, would be excluded in Scotland, because the buyer would not have an obligation to cancel immediately upon breach and mitigate his loss, but could spend a reasonable length of time in deciding whether to claim specific or substitutionary relief.

Scots authority exists for the principle that the buyer may prefer specific relief and claim delivery of ordinary goods identified to the contract. To encourage the Scots court to follow this authority and travel beyond the narrow confines of the Anglo-American approach in *Sutherland*, the pursuer's counsel might compare Scots law with other legal systems in which, though ownership passes by delivery, the principle of the aggrieved party's contractual right to delivery of the ordinary goods is accepted: for example, West Germany, Switzerland, and South Africa. Through these and the French-influenced systems already referred to runs the consistent theme that the judgment creditor is entitled to specific delivery of the specific goods which the execution officer can search for and seize on the judgment debtor's premises. The machinery provided by section 1 of the Administration of Justice (Scotland) Act 1972 for taking disputed goods into custody, and by section 1(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 for goods not taken into custody, is wide enough to be used by the court in favour of the pursuer, whether he is characterized as *dominus* or as contractual claimant of the ordinary goods identified to the contract.

Although "specific goods" are mentioned in section 52 on specific performance and in sections 17 to 19 on the passing of property and the reservation of the right of disposal, it is submitted that specific implement is not restricted to those cases in which the property has passed; so much was decided by Lord Hanworth M.R. in *Re Wait*.<sup>6</sup> Therefore the goods identified to the contract need not be in that deliverable state which would contractually oblige the buyer to take delivery of them. A contract for the sale of five growing trees identified to the contract at the time of agreement should be specifically enforceable. And if the goods identified need not be in the deliverable state prescribed by sections 61(5) and 18(1), there is room for arguing that, if they are to be made by the seller under the contract, they need not be complete: for example, the pursuer may claim removal of so much of a dress as has been made by the now unwilling designer, who would not be compelled to finish the goods, so that the rule against specific implement of contracts requiring personal artistic skill would not be infringed. The court might exercise the discretion allowed by section 52(3) to lower the price to a sum reflecting the amount of work done on the goods so far, and award

damages as the cost of having the goods finished by some other designer, to the standard originally agreed.

Scots law becomes more contentious when the goods are neither specific nor ascertained, but are ascertainable by further effort from the unwilling defender or someone else. Instances may be conceived in which the identified goods are in the custody of a third party; they are not finished and the buyer requires their completion and delivery; the goods are fungibles yet to be weighed or measured; or, though not fungibles, they are generic and sold by description. What obstructs the decree is Lord Watson's ruling in *Seath v. Moore* that the goods have to be identified so that the *emptio* is *perfecta*.<sup>4</sup> Indeed, it may be possible to reconcile *Linn* and *Union Electric* by drawing the factual distinction that the nine stacks of corn were identified at the time of agreement, but the 30,000 Excello yellow flame carbons had never been identified to the contract and so remained generic goods contracted to be sold by description. Where the goods are in a third party's custody, the court, on the pattern of the West German article 886 ZPO, might in the pursuer's favour ordain assignation of the defender's claim to delivery of the goods. If the goods are unfinished and the claim is for completion and delivery by the seller, then the pursuer can argue that, as specific implement may be ordained of contracts to erect buildings<sup>7</sup> or to rebuild them,<sup>8</sup> it may also be ordained for the completion of the goods contracted to be sold, provided that the work required of the seller is not classified by the judge as involving that degree of personal or artistic skill which removes the contract from the scope of the remedy. The building cases, in addition to showing that the remedy is competent even though time-consuming, costly effort is specifically required of the defender, may also serve to remove the obstacle of *Seath*: the remedy is granted, even though no building work has been done and the structure exists only in the descriptive form of an architect's plan and is at that stage a generic thing. Removal of this obstacle would, on the authority of Bell, Wright, and Gow, allow the court to ordain the effort and work necessary to ascertain the goods. So long as the seller remained solvent, the claim for this kind of decree would be distinguishable from those sought in *Re Wait* and *Re London Wine Company (Shippers) Ltd.*,<sup>9</sup> which were attempts by unsecured creditors at stealing a march on the other general creditors of the bankrupt, to acquire the wheat and the wine respectively, which had not been separated from bulk. Specific implement, being a contractual remedy for enforcing a personal right, resolves into damages on the defender's insolvency or liquidation.

The goods may be ascertainable by further effort from someone other than the

defender. Article 884 ZPO entitles the *Gerichtsvollzieher* to seize and deliver fungibles in the defendant's possession. Section 1(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 does not refer to specific or ascertained moveables. The court could instruct its officer as to the whereabouts, description, amount, separation, price and delivery of the fungibles which the seller is obliged to deliver to the buyer; and the officer could complete the necessary delivery. Such an order to the court officer would be practicable for small tasks but probably would be refused where its execution would require too much time and expense.

In view of the controversy attached to deviation from *Seath* by ordaining specific implement of goods neither specific nor ascertained, Scots courts may feel unable to follow Bell, Wright, Gow, and also the South African result in *Benson*. They might instead take the view that, as regards generic goods not identified to the contract, the *Sutherland* approach should prevail. If so, then it is submitted that Scots courts should be urged to exercise their discretion in favour of specific implement when, although the goods are generic, damages are not adequate. One area in which this may happen is that of long-term supply contracts, where the future supplies cannot be identified to the contract before they are needed. In *Sky Petroleum Ltd. v. VIP Petroleum* Goulding J. granted an interim injunction restraining the defendant from breaking a contract to supply all the plaintiff's petrol and diesel fuel for ten years. The judge described as well established and salutary the rule that specific performance would be refused if the goods were not specific or ascertained; but held that in this present case, where the injunction would amount to specific performance until a later trial and order, the rationale of the rule on non-specific goods-- that damages sufficed-- did not apply:<sup>10</sup>

The evidence suggests, and indeed it is common knowledge, that the petroleum market is in an unusual state in which a would-be buyer cannot go out into the market and contract with another seller, possibly at some sacrifice as to price. Here the defendant company appears for practical purposes to be the plaintiff company's sole means of keeping its business going, and I am prepared so far to depart from the general rule as to try to preserve the position under the contract until a later date.

Fairness ousted the general rule. A further source of comparison in this respect is non-civilian United States law,<sup>11</sup> where the English rule on damages adequacy was received, and where section 68 of the Uniform Sale Act 1906 was introduced, its language modelled on section 52 of the British Sale of Goods Act 1893, in order to fulfil the intention of its draftsman, Williston, to liberalize the award of specific performance.

When goods were scarce and market substitutes not readily available during and shortly after World War II, specific performance was ordered of contracts involving machinery for bottling soft drinks, and a sugar quota awarded by the Office of Price Administration;<sup>12</sup> Bulgarian tobacco;<sup>13</sup> and new cars usually acquired on condition that an old one was traded in.<sup>14</sup>

Section 68 was replaced by section 2-716 of the Uniform Commercial Code. The adjectives "specific or ascertained" were abandoned, for, in the draftsmen's opinion, most cases under section 68 had concerned goods which, though not specific or ascertained, were from specific sources and were not otherwise readily procurable.<sup>15</sup> the war scarcity had shown the commercial fact that "goods of any sort can become unique or so difficult to obtain that equity ought to intervene to prevent serious loss to the buyer."<sup>16</sup>

The framework of remedies<sup>17</sup> under the Uniform Commercial Code is that, on the seller's breach, the buyer must if reasonably possible make another contract for substitute goods-- he must "cover"-- and claim the price difference as damages.<sup>18</sup> If cover is impossible or unreasonable, he may claim specific performance or (if the goods have been identified to the contract) the action of replevin.<sup>19</sup> If these remedies are ruled out, damages are assessed as the difference between contract and market price when the buyer discovered the breach.<sup>20</sup> An extraordinary, quick recovery of the goods is possible on the seller's insolvency: the purchaser, by paying the balance of the price, may recover undelivered goods from the seller who goes insolvent within ten days after receiving the first instalment of the price.<sup>21</sup> The buyer's remedy of specific performance is therefore subordinate to cover and damages, and is provided by section 2-716 as follows:

- (1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
- (2) The decree for specific performance may include such terms and conditions as the court may deem just.

The Official Comment adds:

1. The present section continues in general prior policy as to specific performance and injunction against breach. However, without intending to impair in any way the exercise of the court's sound discretion in the matter, this Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.

2. In view of this Article's emphasis on the commercial feasibility of replacement, a new concept of what are "unique" goods is introduced under this section. Specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting. The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the older cases. However, uniqueness is not the sole basis of the remedy under this section for the relief may also be granted "in other proper circumstances" and inability to cover is strong evidence of other proper circumstances.

Though this wording differs from that of the old section 68 and the British section 52, it is interesting that Hawkland, commenting on the U.C.C., considered the phrase "in other proper circumstances" to mean the same as "if it [that is, the court] thinks fit" in the old section 68.<sup>22</sup> This raises the possibility that if damages are inadequate and the goods are neither specific nor ascertained, Scots courts might conveniently look at United States decisions on similar facts.

Many cases decided under the Code have involved long-term supply contracts. In an early one, *Kaiser Trading Co. v. Associated Metals & Minerals Corp.* (1970),<sup>23</sup> a Californian injunction ordered the continuation of instalments of cryolite, used to make aluminium. The chemical was scarce, essential, and probably unobtainable elsewhere in the sustained quantities required. The cotton cases of the mid-Seventies were summarized by Linzer:<sup>24</sup>

In 1973, because of a combination of world politics and weather conditions, cotton prices tripled and many farmers defaulted on futures contracts they had made at about 30 cents a pound because the market price was approaching a dollar a pound. Despite the fungible nature of the goods and the ability of buyers to recover damages even in the absence of cover, most of the reported decisions decreed specific performance, as did many unreported decisions. Some courts held the cotton "unique and irreplaceable because of the scarcity of cotton" and found irreparable harm because buyers and their customers were committed to resale contracts based on the earlier pricing scheme; others found grounds for relief in state statutes other than the Uniform Commercial Code.

At about the same time, and partly as the result of political factors, contracts for the supply of energy and fuel grew dearer. In *Eastern Airlines, Inc. v. Gulf Oil Corp.* (1975)<sup>25</sup> the Florida court followed *Kaiser Trading* and held that unless the company continued supplying the airline with 100 million gallons of fuel a year-- ten per cent. of



its requirements-- chaos and irreparable damage would ensue. The price had previously been upheld by the court as agreed by the parties. Specific performance in such circumstances became the ordinary rule. And in *Laclede Gas Co. v. Amoco Oil Co.* (1975),<sup>26</sup> where the supplier ran short of propane gas, so reduced its allocation to customers by 20 per cent., the long-term contract was specifically enforced, even though short-term substitutes were available. The expense and trouble resulting from fresh arrangements could not be calculated in advance.

The seller in these energy cases has sometimes invoked the defence of commercial impracticability provided by section 2-615, which conflicts with the liberalized administration of specific performance under section 2-716.<sup>27</sup> The defence failed in *Iowa Electric Light & Power Co. v. Atlas Corp.*,<sup>28</sup> involving nuclear fuel, and *Missouri Public Service Co. v. Peabody Coal Co.*,<sup>29</sup> involving coal supply to a public utility for producing electricity during ten years: the supplier was left to rue having made a bad bargain. It was also raised in *Tennessee Valley Authority v. Westinghouse Electricity Corp.*,<sup>30</sup> where the corporation feared a loss of two billion dollars over two decades on contracts for supplying nuclear fuel; the case was settled out of court. Suggestions that specific performance should be granted on condition that the court should adjust the price<sup>31</sup> have been discussed from the viewpoints of economic efficiency and of transactional analysis.<sup>32</sup> An important feature of these energy cases is the presence of a public interest: thus in *Tennessee Valley Authority v. Mason Coal Co.*,<sup>33</sup> "the public nature of the buyer and the importance of the public interest were circumstances which justified specific performance."<sup>34</sup>

The liberating encouragement of section 2-716 is summarized by Greenberg as follows: "A court hesitant to expand specific performance as a matter of traditional common-law development, even though desiring to grant relief as a matter of justice and actually able to do so without violating that tradition, is certainly given the opportunity to expand by the Official Comment."<sup>34</sup> He instances *Copylease Corp. of America v. Memorex Corp.*: the seller's toner and developer surpassed rivals' products, and the action for their continuing supply was upheld, despite the court's traditional reluctance to superintend the enforcement of such contracts.<sup>35</sup>

Finally, Handler<sup>36</sup> has posited three hypothetical examples, progressively unusual in commercial cases, which could merit the award of specific performance. When a dealer breaks his contract to deliver a new car, and the nearest other dealer is sixty miles away, the buyer should not reasonably have to suffer the trouble and inconvenience of travelling to the latter for service under a substitute car's warranty. Again, if a seller

breaks his contract and the only other local seller is boycotted by civil rights groups alleging discriminatory employment practices, the buyer should not reasonably have to contract with the latter seller and risk the same boycott, bad publicity, and loss of the goodwill so important to local business. "Other proper circumstances" are here present, as likewise in the third example, where the second seller is a racist or religious bigot, vocal against the group to which the purchaser belongs. The court should exercise its discretion to spare the buyer the harm to dignity and conscience which the ordinary commercial rule would inflict. Referring to section 2-608(1) and its Comment 2, Handler submits that here "an objective standard of proof could be structured, whereby the buyer would be able to show why the cover source is not reasonable."<sup>37</sup>

Scots courts have the means, authority, and comparisons to ordain specific implement in respect of goods specific or ascertained. When the goods are not ascertained, Lord Watson's ruling in *Seath* may still be regarded as precluding reliance on Bell, Wright, and Gow in normal circumstances, so that the rule on damages adequacy applies. But if damages are not adequate, whether because they cannot be calculated with any certainty or because the purchase of market substitutes is not possible or reasonable, then the fact that the goods are unascertained should not prevent a Scots court from referring to these Scots writers, to *Sky Petroleum*, to similar United States decisions, and to the judgment in *Benson*, before granting specific implement on grounds of justice and fairness.

#### Notes

1. Section 61(1) of Sale of Goods Act 1979.
2. [1927] 1 Ch. 606, 630 (C.A.).
3. Mercantile Law Amendment Act 1856.
4. *Seath*, 1886, 13 R. (H.L.) 57, 64 *per* Ld. Watson.
5. Christie, 9 J.R. 274 (1897); R. BROWN, TREATISE xix, xii.
6. *Re Wait* [1927] 1 Ch., 617.
7. *Middleton v. Leslie*, 1892, 19 R. 801; *McKellar v. Dallas's Ltd.* 1928 S.C. 503.
8. *Marshall v. Callender Hydro Co.* 1896, 23 R. (H.L.) 55.
9. Transcript in R.M. GOODE, PROPRIETARY RIGHTS AND INSOLVENCY IN SALES TRANSACTIONS 95-130 (1985); [1986] P.C.C. 121.
10. [1974] 1 All E.R. 954, 956*d-e*.
11. *See* Greenberg, 17 NEW ENGLAND L. REV. 321 (1982); Handler, 33 UNI. OF PITTSBURGH L. REV. 243 (1971); Schmitt & Pastercyck, 26 DEPAUL L. REV. 54 (1976); 26 AMERICAN LAW REPORTS 4th 284 and A.G. Nadel's

annotation (1983).

12. Unatin 7-Up Co., Inc. v. Solomon, 350 Pa. 632, 39 A.2d 835 (1944); Handler, 33 U. PITT. L. REV., 247.
13. Glick v. Beer, 263 App. Div. 599, 33 N.Y.S.2d 833 (1942); Handler, 33 U. PITT. L. REV., 248.
14. Heidner v. Hewitt Chevrolet Co., 166 Kan. 11, 199 P.2d 481 (1948); Handler, 33 U. PITT. L. REV., 247-8.
15. Greenberg, 17 NEW ENG. L. REV., 328 and n. 47.
16. Quoted in Greenberg, 17 NEW ENG. L. REV., 333 and n. 76.
17. Small, 4 GONZAGA L. REV. 176, esp. 198-9 (1969).
18. U.C.C. 2-712.
19. U.C.C. 2-716.
20. U.C.C. 2-713.
21. U.C.C. 2-502.
22. Quoted in Greenberg, 17 NEW ENG. L. REV., 343.
23. 321 F. Supp. 923 (N.D. Cal. 1970).
24. Linzer, 81 COLUM. L. REV. 111, 129-30 (1981).
25. 415 F. Supp. 429 (S.D. Fla. 1975).
26. 522 F.2d 33 (8th Circ. 1975).
27. Schmitt & Pastercyck, 26 DEPAUL L. REV., 66 *et seq.*
28. 467 F. Supp. 129 (N.D. Iowa 1978).
29. 583 S.W. 2d 721 (Mo. Ct. App. 1979).
30. Joskow, 6 JOURNAL OF LEGAL STUDIES 119 (1977); Schmitt & Pastercyck, 26 DEPAUL L. REV., 71.
31. Schmitt & Pastercyck, 26 DEPAUL L. REV., 75-6.
32. Speidel, 76 NORTHWESTERN UNI. L. REV. 369 (1981).
33. 284 F. Supp. 1107 (E.D. Tenn. 1974).
34. Greenberg, 17 NEW ENG. L. REV., 349.
35. 408 F. Supp. 758 (S.D.N.Y. 1976).
36. Handler, 33 U. PITT. L. REV., 243-4, 254-5.
37. *Id.*, 255 and n. 45.

## Chapter 17: The Economic Theory of Specific Performance

So far specific implement has been treated as self-evidently superior to damages. Historically, its English counterpart has been subordinated to damages, and the comparative references to specific implement which form the background to section 52 of the Sale of Goods Act 1893 show an effort to copy the more liberal approach of Scots law. More recently, though, American and English scholars have debated how far specific performance and damages meet standards of fairness and efficiency: some of their conclusions may reveal unsuspected strengths of damages and aspects of specific performance which civilian jurists must either resign themselves to accepting as drawbacks or else use to reassess the value of elevating specific performance to the status of a primary remedy.

### Fairness

The fairness of specific performance as a primary remedy has been attacked with spirit by Yorio.<sup>1</sup> Though the availability of the remedy strengthens the moral idea that promises should be upheld,<sup>2</sup> the law may just as well show its regard for morality and bindingness by awarding damages for loss of expectation.<sup>3</sup> In stressing the morality of promise, a jurist such as Fried has not made specific performance a requirement.<sup>4</sup>

Yorio<sup>5</sup> examines three of Schwartz's arguments for widening the scope of specific performance in American law:<sup>6</sup> first, damages are often undercompensatory; second, the victim of the breach, the promisee, is a better judge of the adequacy of damages than are the courts; and, third, the promisee would not abuse the routinely-available specific performance in order to exploit the promisor.

Under the first head, Schwartz avers that contract remedies are intended to compensate the promisee.<sup>7</sup> This aim is best achieved by specific performance, which grants the promisee what was contractually agreed; and its furtherance appears impeded by American restrictions on specific performance.<sup>8</sup>

Yorio disagrees that compensation either is or should be the sole aim of contractual remedies.<sup>9</sup> Other considerations sometimes operate to exclude, restrict, or extend it. Compensation is governed by fairness and efficiency.<sup>9</sup> So, if the case involves unconscionable behaviour by the promisee, no compensation is awarded; if breach either inadvertent or caused by unforeseen contingency, reduced compensation; if deliberate breach leaving the promisor an unjustified windfall, unusually increased compensation.<sup>10</sup> Courts entitled to refuse compensation on grounds of fairness may

similarly refuse specific performance; when granting compensation, they may choose which form it shall take.<sup>11</sup>

Under the second head, Schwartz contends that as the promisee best judges the advantages and risks to him of specific performance or damages, the choice of remedies should be his. This rule, Yorio replies, excludes whatever interest in the decision may be held by the promisor or the court.<sup>12</sup>

The promisor's interest rests on his right to freedom from involuntary coercion in some circumstances<sup>13</sup> and on his right of freedom of contract.<sup>12</sup> In a posited hypothetical universe, where no legal remedies had been "articulated,"<sup>14</sup> parties would agree on remedies for breach. From silence on this topic it might be inferred that they each reserved an interest in and right of contributing to the decision; that they each submitted the decision to the court; or that they each expected the performance of the written agreement.<sup>12</sup>

The first possibility conflicts with the rule according the promisee the election of remedies. Had he known this rule, the promisor might never have concluded the contract.<sup>12</sup> The rule on the promisee's election of remedies also clashes with the third possibility, which requires specific performance even if the promisee chooses damages.<sup>15</sup> The second possibility empowers the court, not the promisee, to decide the remedy.<sup>16</sup> The promisor's interest in the decision about remedies is weakened but not excluded by his contractual fault; the degree of fault and the severity of the burden to be imposed on him remain considerations.<sup>15</sup>

Spite and vindictiveness may colour the promisee's choice of specific performance, particularly after long, fruitless attempts at eliciting the defaulter's performance.<sup>17</sup> More often, such a choice broadcasts a deterrence against breach by other promisees. These motives diverge from the aim of compensation which justifies specific performance.

The court's interest in remedies stems partly from a desire to maintain its reputation for granting effective remedies.<sup>17</sup> Disobedience or defective performance of the court order may impel the disappointed promisee who has misjudged the risk of this outcome to demand a finding of contempt against the defaulter. The court may experience great, even insuperable, difficulty in judging defectiveness or perfidy in performance.<sup>17</sup> More important, the court keeps faith with itself by rejecting participation in what it sees as wrong, and by advancing substantive fairness.<sup>18</sup> To do so, it must weigh the degree of the promisor's fault against the possible motives of the promisee for demanding specific performance; the added burden on the promisor against

the added benefit to the promisee.<sup>18</sup> So, if the seller has not delivered widgets, three reasons justify the refusal of specific performance.<sup>19</sup> Extra benefit to the buyer is scant: other widgets usually abound in a fungibles market supplying enough information about the adequacy of damages. Damages being adequate, the buyer apparently claims specific performance to spite or deter. Availability of market substitutes suggests that the seller's breach results from complications such as strikes in the factory, supplier's non-delivery, or the high costs to him of buying in substitutes (high costs of cover).

Yorio's objections to the specific performance of a sale of fungible goods conflict with the Scots approach in *Linn*,<sup>20</sup> the South African approach in *Benson*,<sup>21</sup> and the civilian approach in France,<sup>22</sup> West Germany,<sup>23</sup> and Switzerland.<sup>24</sup> *Linn* concerned a most fungible commodity, corn, but Lord Justice-Clerk Inglis did not hint that the buyer should seek a substitute in the Bathgate market mentioned in the defender's evidence.<sup>25</sup> No sign of the inadequacy of damages or of market failure appears from the record. And the election of remedies remains the pursuer's.<sup>26</sup> In *Benson* the shares were ordinary. Doubt exists whether they were freely available in the market: at 783H, Hefer J.A. said that "although the evidence seems to point the other way, I am prepared to assume that they would have been obtained without difficulty and to deal with the argument on that basis"; yet at 785G he said that "the trial Court considered the fact that the shares were readily available in the market, and the fact that the respondent could have been adequately compensated by the damages, and found them insufficient reason to deny the respondent specific performance." Hefer J.A.'s assumption and his upholding of the trial court's decision may be criticized according to Yorio's argument from fairness. The extra benefit to the Society from Benson's specific performance remains obscure: 22 October, 1982, by which the 63,600 shares had to be registered if they were to earn a dividend, had long since passed, nor do the shares seem to have been purchased so that the Society might acquire a majority holding in the McCarthy Group Ltd. The extra burden on Benson appears from his plea<sup>27</sup> that the Society could have bought substitute shares in the market at any time, without difficulty, and for less than the contract price of R2.10 a share. Market substitutes would have saved the Society and, indirectly, Benson a loss of R133,560 on 63,600 shares. The alleged drop in the share price suggests that the number of McCarthy shares on the market had increased: for, by the law of demand, the price and quantity of a good are inversely proportional.<sup>28</sup> If substitutes were available on the market, then, in Yorio's view, the Society's motives in claiming delivery of the 63,600 generic shares from Benson were spiteful or deterrent.

Supporters of *Linn* and *Benson* might criticize Yorio's posited hypothetical universe as corresponding to no actual system in which a main rule on the primacy of remedies-- whether specific performance, as in South Africa or Scotland; or damages, as in England and America-- is laid down. Such a rule is an established phenomenon which the parties must deal with, either by endorsement or by negation. In so far as not expressly excluded by the contractual terms, a main rule on specific performance subsists, weakening Yorio's argument against the promisee's right of electing remedies. Yet, if at the conclusion of the contract neither party knew anything about the law of remedies, then Yorio's first possibility-- that the promisor might never have entered into the contract had he known about the promisee's right of election<sup>12</sup>-- allows us to conclude that the court would then be implying a right of election into a contract under which the promisee had hitherto lacked such a right. If Yorio were to disapprove of this implication of terms, he would accordingly have to dispense with the whole concept of implied terms and a residual law of contract. Considerable impoverishment of the law would ensue.

If the main rule favours specific performance, Yorio shows us that the office of the judge in upholding the interest of the promisor and of the court itself may be more restricted than the office of a judge in a system where the main rule favours damages. It follows that, in civilian systems, the defendant breaks the contract at his peril, and the court's discretion to refuse specific performance is confined to cases of impossibility and unfairness. In *Benson*, the Society's failure to buy substitutes and save itself the loss of R133,560 which, by successfully claiming specific performance, it then forced Benson to underwrite, did not seem unfair to the trial court or to the Appellate Division.

A promisee's motives for claiming specific performance might be justified in the following way by those who support the primacy of specific performance. Specific performance does compensate the promisee for breach of contract. His right of electing remedies gives him a liberty to determine what form that compensation shall take, whether specific performance or damages. Yorio's accusations of spite and deterrence may sound well in a system favouring damages as primary remedy; but in a system favouring specific performance, the law allows the promisee to choose compensation in specific form and tolerates the side-effects of his working revenge upon the actual defendant and deterrence upon potential defendants. The fact that other victims of breach may buy substitutes in the market and then claim damages does not harden into the rule that the present promisee should forego his legal right and liberty to prefer specific performance and should join them: people who argue otherwise slip into the

usage famously detected by the philosopher, David Hume, that "is" and "is not" observations about human affairs imperceptibly shift to "ought" and "ought not" propositions about those affairs.<sup>29</sup>

### Efficiency

Justice Oliver Wendell Holmes declared:<sup>30</sup>

Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract.... The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,— and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.

From this scepticism about specific performance, several exponents of the theory of the efficient breach of contract have developed their opposition to the remedy,<sup>31</sup> applying methods of neoclassical economics. Not trained in economics, I rely on Veljanovski's book, *The New Law-and-Economics; A Research Review*,<sup>32</sup> for the background to the theory of efficient breach; and, with the minimum of discussion, I state the essentials of a subject wide enough for a separate thesis.

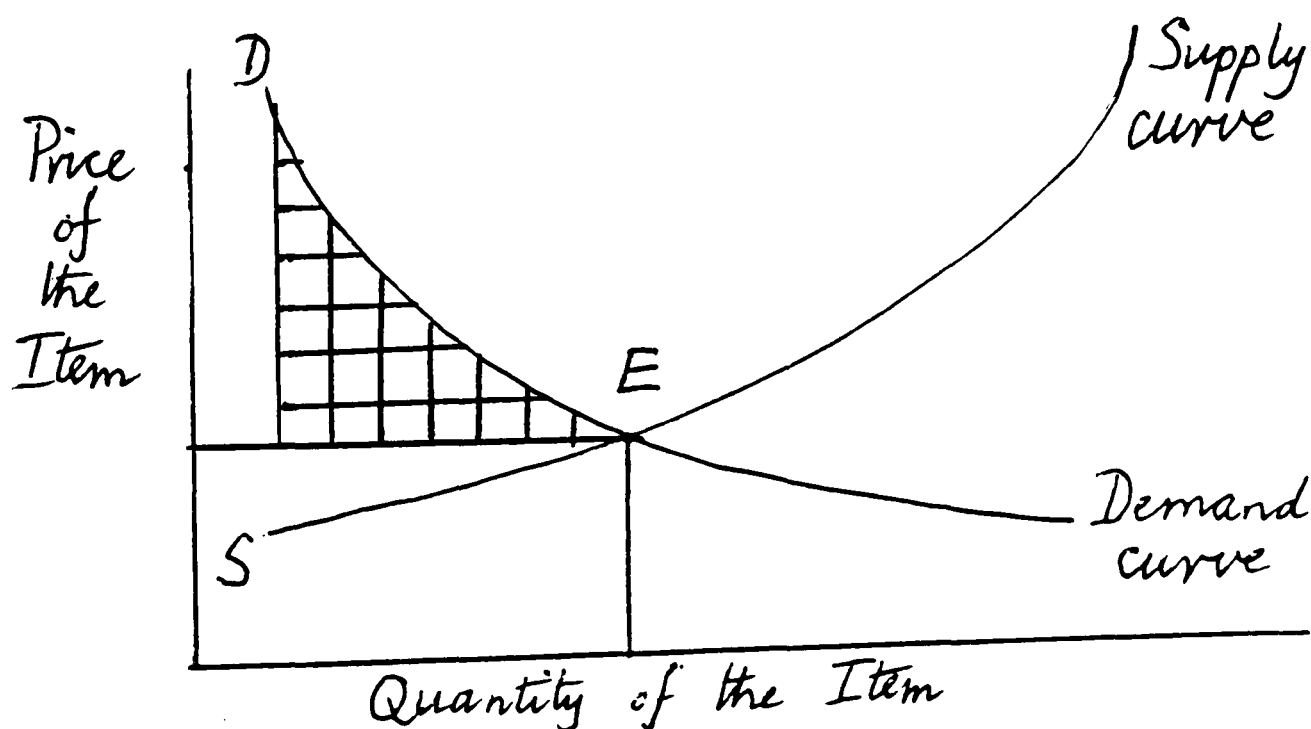
Using models to simplify for clarity's sake the constituents of and variable forces acting upon a set of circumstances,<sup>33</sup> economists pursue two kinds of inquiry, each with its separate aims and methods. Positive economics analyses what is,<sup>34</sup> studying partial relationships between variables while holding others constant, and formulating testable, empirical predictions about human behaviour. Techniques include modelling and a branch of statistical mathematics called multiple-regression analysis (econometrics). Normative economics (welfare economics), by contrast, studies what should be;<sup>35</sup> sets standards for ranking situations according as they increase or decrease social welfare; and concentrates on market efficiency and failure, and on the distribution of wealth in society. Resultant conclusions are factually unverifiable. To these two kinds of economics, Veljanovski adds a third, descriptive economics:<sup>36</sup> written mostly by lawyers, its main purpose is to describe and explain the content, rules, and workings of the legal system. Its assumptions must be descriptively accurate and factually verifiable. Much of it needs more rigorous testing.

The basic premises of neoclassical economics include methodological individualism; the maximization principle; stable preferences; opportunity cost; and



incentive analysis. Methodological individualism posits an individual making rational choices.<sup>37</sup> According to the maximization principle, each individual maximizes his total utility;<sup>38</sup> in Lipsey's paraphrase, members of a household doing so "try to make themselves as well off as they possibly can in the circumstances in which they find themselves."<sup>39</sup> The corollaries of the principle are that goods may be substituted for others or for money at the margin; individuals try to maximize benefits and minimize costs, reacting predictably to changed circumstances; and, under the equimarginal principle, different resources are exchanged so that the value of the last unit of each is equal. The assumption of stable preferences holds all tastes as given and constant; closes a bolt-hole for economists' rationalization; but strikes laypeople cajoled by advertising as somewhat artificial.<sup>40</sup> Opportunity cost "emphasizes the problem of choice by measuring the cost of obtaining a quantity of one commodity in terms of the quantity of other commodities that could have been obtained instead."<sup>41</sup> It is wider than the accountant's idea of cost.<sup>42</sup> Incentive analysis reveals economics as approaching a problem *ex ante*, in contrast with the *ex post* approach by which lawyers handle an issue already joined. Economists study how changing variables and policy may provide incentives for people's future behaviour.<sup>43</sup>

Markets and prices give vital information to buyers, sellers, and economists.<sup>44</sup> By the law of demand, price and quantity of an item are inversely proportional, *ceteris paribus*;<sup>45</sup> by the law of supply, the quantity of an item which a producer is willing to supply depends on its price, *ceteris paribus*.<sup>46</sup>



The above diagram showing the supply of and demand for an item illustrates, among other information, the consumer surplus in relation to the item.<sup>47</sup> Harris, Ogus, and

Phillips<sup>48</sup> explain that the consumer surplus is

the excess utility or subjective value obtained from a "good" over and above the utility associated with its market price. ... [T]his utility has no necessary relationship with the price paid, and is of quite a different order from market prices or business profits. ... [W]illingness to pay, rather than market price, is the appropriate measure for estimating the value of a purchase, and the consumer surplus is the difference between this and the market price. ... [C]onsumer surplus has its analogue in commercial cases where profit rather than utility is the aim of the contract: the market price may underestimate the value of the good to the firm which buys it, and the surplus value above the market price will be represented by its contribution to profit-making.

The consumer surplus is illustrated by the cross-hatched area above the market equilibrium price (E) and below the demand curve (DD).

Economic efficiency<sup>49</sup> may be stated in terms of two concepts. Pareto efficiency, named after the Italian economist and sociologist, Vilfredo Pareto, rests on ethical premises that the individual best judges his own welfare; that the welfare of society depends on the welfare of individuals; and that the welfare of society is improved by any change which increases at least one individual's welfare without diminishing any other individual's welfare.<sup>50</sup> Pareto efficiency combines with other assumptions to produce the concept of perfect competition:<sup>51</sup> individuals maximize their utility; firms maximize their profits; no one seller or buyer can influence the price of a commodity; products are homogeneous; entry to and exit from the market is free, information about market opportunities complete. It is also assumed that changes happen without cost or delay; uncertainty is absent, knowledge perfect; tastes, technical progress, and population are given and unchanging; utility derives from consumption of goods and services; all functions (utility and production) are convex and twice differentiable; in the model, the choice by each actor is rational, consistent, independent of others', and constrained by his own real income.

*Given these stringent assumptions, [says Veljanovski<sup>52</sup>] a perfectly competitive market produces a Pareto efficient allocation of resources [which] gravitate to those uses where their economic value is greatest. The criterion of maximum value is Pareto efficient because there exist no further trading opportunities between any two (or more) individuals in the market that would be economically efficient.*

"The theory of the perfectly competitive market structure applies directly to a number of real-world markets, particularly agricultural goods and industrial materials."<sup>53</sup>

Pareto efficiency is restrictive: change in society almost always leaves someone worse off, and economists cannot compare one person's utility with another's.<sup>54</sup> To meet these difficulties, the British economists, Kaldor<sup>55</sup> and Hicks,<sup>56</sup> proposed a test variously called Kaldor-Hicks efficiency, potential Pareto improvement, the hypothetical compensation test, cost-benefit analysis, wealth maximization, allocation efficiency, or efficiency *simpliciter*. Gainers from a social change could in theory compensate losers and still be better off by a net gain: benefits exceed costs. Kaldor-Hicks efficiency diverges from Pareto efficiency in that compensation is theoretically, but not actually, payable.<sup>57</sup>

Lawyers applying efficiency to the law often fail to specify what they mean.<sup>58</sup> Usually they are applying Kaldor-Hicks efficiency. Efficiency is merely the best way of doing something. "[I]n any model based on maximizing behaviour, the content of efficient outcomes depends crucially on the assumptions underlying the analysis."<sup>58</sup> Some lawyers have confused the assumptions of economic models with the concept of efficiency.<sup>59</sup> Economists want consumers' surplus and producers' surplus<sup>60</sup> to be maximised. Lawyers have expressed this goal in two ways misrepresenting the general idea of economic efficiency: wealth maximization, and replication of the market.<sup>61</sup> Wealth maximization supposes parties indifferent to risk (risk-neutral); not averse to risk and consequently wishing to guard against it by a transfer of wealth, as under insurance arrangements.<sup>61</sup> Replicating the market is the error of thinking that, as perfect markets yield efficient outcomes, in imperfect conditions people achieve efficiency by doing what the market would do.<sup>62</sup> Hypothesis of this kind supposes legal measures that are costless; yet the cost of changes in legal policy must be included in the decision. Further, market-based analysis concentrates on goods and services but measures non-market values ineptly. As Veljanovski observes:<sup>63</sup>

When economics is extended to the analysis of the non-market and 'law', it is clear that the individual's preferences for these must be respected even if they reject the law. Thus it is far from clear that perfect market outcomes, even if costlessly attainable, are the appropriate or efficient benchmark with which to evaluate the law.

And market-based analysis overlooks the need for rights preceding markets and guaranteeing property, contractual freedom, and criminal law.<sup>63</sup>

The requirement of efficiency creates problems of the first-best;<sup>64</sup> of the second-best;<sup>65</sup> and of distributive justice.<sup>66</sup> Problems of the first-best include the possibility that losers from Kaldor-Hicks efficient change may pay gainers to reinstate the prior

position, which by definition is then efficient;<sup>67</sup> the element of involuntariness which deprives Kaldor-Hicks efficiency of much ethical worth; and the vagueness about why an increase in potential welfare necessarily surpasses an increase in actual welfare. Problems of the second-best,<sup>68</sup> often ignored by lawyers writing descriptive economics, reveal that in

an imperfect world, where some sectors persistently and irremediably deviate from efficiency, it will no longer be true that fostering efficiency in other sectors will maximize economic efficiency. The constraint imposed by deviant segments of the establishment must be taken into consideration and this will require immensely complex, if not impossible, calculations to determine optimal policy.

Problems of distributive justice and equity reveal that an obsession with efficiency as an inherently desirable aim ignores the ethical importance of how entitlements and wealth are presently allocated in society and how they should be shifted to make that society more just.<sup>69</sup> The "only Pareto-efficient outcome ... socially desirable is ... based on a just distribution of income and property rights"; and "[i]nefficiency may be economically acceptable in practice if it leads to more desirable or ethically more attractive distribution of wealth."<sup>70</sup>

Veljanovski sees the neoclassical approach to law as founded on three propositions:<sup>71</sup> Adam Smith's proposition about voluntary exchange; Ronald Coase's Theorem; and Richard Posner's proposition. Smith's proposition states that each contracting party views the deal as advantageous to himself, otherwise he would not be contracting.<sup>72</sup> (So Wimbledon enthusiasts buy overpriced tickets from touts.) Ronald Coase's article, *The Problem of Social Cost*,<sup>73</sup> helped to establish the new law-and-economics. His theorem is that it "is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production."<sup>74</sup> The theorem makes several implicit assumptions:<sup>75</sup> Smith's proposition; perfect knowledge and no strategic behaviour by the parties; competitive markets; no transaction costs; a court system which is costless; producers maximizing profits, and consumers maximizing utility; and no wealth effects. Wealth effects have to do with the allocation of rights: for example, unless legally entitled to clean air, one has to buy the right to it from the polluter, so that the "maximum sum [a person] will pay for something valuable is obviously related to, indeed limited by, a person's total resources, while the minimum sum he will accept for parting

with it is subject to no such constraints."<sup>76</sup> Transaction costs are the obstacles to a market solution, the costs of using the market, and arise from search, negotiation, contract formation, monitoring, and enforcement.<sup>77</sup> They may intervene between the parties' respective valuations of the contract so as to prevent the conclusion or impair the resultant benefit.<sup>77</sup> Strategic behaviour by the parties conflicts with the economists' view that individuals, as "price-takers," merely choose from the range of contracts determined by impersonal market forces: squabbling over the division of wealth and risk is socially wasteful.<sup>78</sup> Coase's implicit assumption that bargaining among small groups is cooperative requires empirical confirmation.<sup>79</sup> Finally, Posner's proposition is that "when market transaction costs are prohibitive, rights should be assigned to those who value them most"; a restatement of Kaldor-Hicks efficiency.<sup>79</sup>

During this gallop we have glimpsed a few of the assumptions, complexities, and debatable averments which lie behind the theory of efficient breach stated in the works discussing specific performance. This theory encourages a contracting party to break his contract if his profit from another contract would exceed the damages payable to the aggrieved party and calculated as the difference between the contract price and the market price at the date of breach or cancellation.<sup>80</sup>

I shall now review the debate over the economic theory of specific performance. The Anglo-American limits to the scope of the remedy are supported by Kronman;<sup>81</sup> Harris, Ogus, and Phillips;<sup>82</sup> Posner;<sup>83</sup> and Yorio.<sup>1</sup> Extensions to the scope of the remedy are proposed by Schwartz;<sup>84</sup> Linzer;<sup>85</sup> and Ulen.<sup>86</sup> Macneil<sup>87</sup> preserves a chief's independence by suggesting the breach is not necessarily an efficient result: a rather different result-- the non-performance of the first contract and the performance of the second contract instead-- may be more efficient than the result of breach;<sup>88</sup> and the comparison whether specific performance or damages is the more efficient remedy is determined entirely by their respective transaction costs and externalities in a given case.<sup>89</sup>

Kronman<sup>90</sup> opened the debate by applying to specific performance the discussion by Calabresi and Melamed on entitlements.<sup>91</sup> Entitlements are protected either by a "property" rule, which requires other parties to negotiate with the holder for voluntary transfer of the entitlement, on pain of special sanctions such as fines and imprisonment; or by a "liability" rule, which allows other parties to acquire the entitlement by paying damages which a state representative decides reflect the holder's loss. The "liability" rule applies where the costs of voluntary transfer are high; the "property" rule, where they are low. As contracts between two parties known to each other suggest that negotiation

costs are low, why does Anglo-American law usually protect entitlements to performance with a "liability" rather than a "property" rule?

The answer lies in the uniqueness test of performance<sup>92</sup> and in the parties' remedial preferences at the conclusion of the contract.<sup>93</sup>

Economists consider no item unique.<sup>94</sup> Consumers' behaviour shows that "every good has substitutes, even if only very poor ones" and "all goods are ultimately commensurable."<sup>94</sup> (Non-economists sceptically meditate on substitutes for the "Pieta" or the "Mona Lisa.") From the idea of commensurability, Kronman derives the Anglo-American rule on the inadequacy of damages: if the costs to the court of determining what the plaintiff deems substitute performance are too high, and the information about substitutes lacks quantity and detail, then the plaintiff risks being undercompensated by damages.<sup>95</sup> Precontractual costs of searching for the particular item cannot be recouped under present rules of damages; information gathered in the search is a capital stock which continues to help the aggrieved party find a substitute, but information which led him to a unique item will have lost most of its value.<sup>96</sup>

Harris, Ogus, and Phillips<sup>97</sup> corroborate Kronman's analysis with their discussion of consumer surplus and contractual remedies; a

potential consumer surplus may exist in relation to all contractual undertakings, irrespective of their price, uniqueness of the subject matter, or the availability of a market in which substitute performance of the promise can be obtained. But those factors may determine whether, in accordance with the doctrine of mitigation, compensation equal to the market price will enable the disappointed promisee to buy a substitute which should give him a similar surplus to the one he expected to enjoy. The fact that the subject matter of the contract is not unique does not exclude the possibility of an expected consumer surplus, but in the normal case the disappointed buyer should be able to obtain a sufficiently close substitute from which it is reasonable to assume that he should derive a similar consumer surplus. Conversely, the mere fact that the subject matter ... is unique does not necessarily mean that the promisee expected to obtain a consumer surplus from it, *e.g.* his personal valuation may ... equal the market price. Thus, the law of contractual remedies need take account of consumer surplus only where full mitigation is impossible.<sup>98</sup>

Loss of consumer surplus will often be a trivial sum.<sup>99</sup> Judges have intuitively acknowledged consumer surplus by granting claims for specific performance of those contracts typically involving it, such as land or goods with *pretium affectionis*, where substitutes conferring reasonably similar consumer surplus are not available.<sup>100</sup>

On the subject of pre-breach negotiations, Kronman avers that parties free to

insert into their contract a clause entitling the promisee to specific performance do so only if the promisee's benefit from the remedy exceeds the promisor's costs.<sup>101</sup> For unique goods, the promisee keenly desires the clause;<sup>102</sup> the promisor obtains release from the clause only by paying more than he would under a damages rule,<sup>103</sup> but is reconciled to accepting the clause by estimating the unlikelihood that he will not want to break a contract in an undeveloped market for a unique good.<sup>104</sup>

In the case of a contract for non-unique goods and services, by contrast, the existence of a developed market increases the likelihood that the promisor will receive alternative offers before he has performed the contract. The promisor will therefore be anxious to retain the freedom and flexibility enjoyed under a money damages rule.<sup>104</sup>

He also wishes to avoid the high transaction costs of negotiating a voluntary transfer of the holder's entitlement to performance.<sup>105</sup>

Schwartz objected that markets for unique goods are not necessarily undeveloped: witness those for antiques.<sup>106</sup> Markets for unique goods, he continued, not only show wider differences in price than do fungibles markets tending towards equilibrium price, but also a slower rate of arrival by shoppers searching for objects highly differentiated, and less comparable with substitutes. Search costs for buyers remain high, tests for quality protracted. Therefore, sellers of unique goods, confounding Kronman's prediction, would strive to preserve their freedom to break a contract which a "liability" rule allows,<sup>107</sup> particularly so that they could raise prices in order to meet a sudden rise in demand for scarce goods.<sup>108</sup>

Yorio<sup>109</sup> supports Kronman by suggesting, on the advice of seven lawyers representing twenty New York dealers in rare art,<sup>110</sup> that a seller of a unique good who, as Schwartz contends, resisted inclusion of a clause guaranteeing specific performance of the contract would arouse suspicion in the buyer, perhaps frustrate conclusion of the sale, and drive away other buyers informed of his shiftiness. Goodwill over the long term persuades the seller to acquiesce in the clause.

Ulen<sup>111</sup> criticizes Kronman for limiting specific performance to unique goods, rather than to the class of goods about which the buyer may have a subjective valuation; "the class of things to which someone attaches a subjective valuation is greater than the class of unique items."<sup>112</sup> As evidence undermining Kronman's view of the parties' *ex ante* preferences, Ulen refers to the widened jurisdiction for specific performance in certain American cases;<sup>113</sup> Corbin's remark that American courts often do not consider adequacy of damages before granting specific performance;<sup>114</sup> and the competence of

specific performance as an ordinary remedy in civilian systems.<sup>115</sup> "Perhaps the tastes of contracting parties in Western Europe [by which Ulen means France and West Germany] are vastly different from those in the common law countries, but this is very doubtful. More likely, there is no necessary connection between specific performance and uniqueness."<sup>116</sup> In a footnote to this conclusion he continues:<sup>117</sup>

Alternatively, it may be argued that specific performance is not in practice, the routine contract remedy in civil law countries. Some scholars note a trend toward convergence in contract remedies in the civil and common law countries. See A. VON MEHREN & J. GORDLEY, [THE CIVIL LAW SYSTEM (2d ed., 1977)] at 1122-23. There is, however, a dearth of empirical evidence on this point.

Having expanded Kronman's uniqueness test into one of "subjective valuation," Ulen concedes the rest of his analysis.<sup>118</sup> Although Ulen's counter-references are telling, his criticism of the uniqueness test had already been rebutted, I think, by Harris, Ogus, and Phillips:<sup>119</sup> their views on specific performance tend to support Kronman's; and their "consumer surplus" is economic jargon for Ulen's "subjective valuation."<sup>120</sup>

Ulen suggests that the costs of making a contract would not vary much if specific performance were routinely available in common law jurisdictions.<sup>121</sup> Buyers averring consumer surplus would be saved the "high cost of contracting around the inadequacy of money damages or of demonstrating at trial the inadequacy of money damages."<sup>121</sup> Sellers of fungibles, though confronted with increased transaction costs, would protect themselves with clauses about liquidated damages and, in due course, with standard-form contracts excluding the buyer's right to specific performance.<sup>122</sup> Ulen's prediction is partly confirmed by Rabel:<sup>123</sup>

Andere sehr wichtige Fälle, in denen auch auf dem Kontinent der Erfüllungsanspruch entfällt, ergeben sich aus dem *Formularrecht*. In einem großen Teile der Geschäftsbedingungen und Bräuche im Handel mit Massenartikeln, namentlich Getreide, wird der Anspruch auf Erfüllung ausdrücklich ausgeschlossen.<sup>124</sup> Öfter ist die Stellungnahme der Verfasser des Formulars nicht deutlich, aber offenbar eine unbewußte Beeinflussung durch das englische Recht anzunehmen. Endlich gibt es auch eine Anzahl von Formularen, die in absichtlichem Gegensatz zu den erwähnten das Recht, auf Erfüllung zu bestehen, betonen; doch wird davon "verhältnismäßig selten Gebrauch gemacht".<sup>125</sup> Ob Anerkennungen dieses Rechts wie im Donaukontrakt und in den Wiener Börsenusancen im Gegensatz z.B. zu den deutsch-niederländischen Verträgen sich etwa aus der Unabhängigkeit von



englischen Vorbildern erklären?

Perhaps such exclusion clauses will appear in contracts for the sale of shares in South Africa after *Benson*,<sup>126</sup> and illustrate Coase's Theorem that the legal result varies from the parties' initial rights.<sup>74</sup>

To meet criticism that the costs of routinely-available specific performance would exceed the post-breach negotiation costs of damages, Schwartz imagines that a widget is sold for  $\$x$ , another buyer offers  $\$(x + 30)$ , and the fluctuating market price settles at  $\$(x + 15)$ .<sup>127</sup> Breach, resale, and a main rule on expectation damages enable the seller to profit by \$15, which specific performance enables the first buyer to appropriate or, by a successful threat of claiming that remedy, to share. In efficiency theory, distribution of the \$15 profit between seller and first buyer causes a "deadweight" loss creating no social wealth. The first buyer's obligation to buy a substitute with the damages of  $\$(x + 15) - \$x$  readily offered by the seller, rather than exercising his election of specific performance against a seller who retains the profit, seems to encourage the more efficient solution but assumes that sellers' costs of acquiring substitutes exceed buyers'.<sup>128</sup> If sellers' costs are equal or less, post-breach negotiation costs are no higher under specific performance than under damages. Schwartz thinks that sellers' costs do not exceed buyers': the seller must compare his rivals' prices and products; the seller, after concluding the first contract, probably understands the buyer's needs as well as he does; and the seller of complex machinery or services knows more than the buyer about the quality and cost of a substitute.<sup>129</sup>

Schwartz raises and answers four objections to his argument for specific performance.<sup>129</sup> First, if sellers' costs of obtaining substitutes (cover costs) exceed purchasers', breach is encouraged and subsequent negotiation costs under specific performance are higher than under damages: for buyers would threaten specific performance to capture the difference between the buyers' and the sellers' costs of cover. But the legal costs of a credible threat would usually exceed the difference sought: specific performance would lose its attraction.<sup>130</sup> (Professor Black remarks that this result would not necessarily be so in a system which, unlike the American, awards the successful party his costs against the loser.) Second, cover may be impossible for sellers to arrange. Likewise, however, it becomes impossible for buyers. Specific performance is granted.<sup>131</sup> Third, the first buyer may have a fungible use for a piece of land as a farm, say, whereas the second buyer may have a special use for it as a restaurant site.<sup>132</sup> Two results of specific performance Schwartz considers objectionable. Having

learned of the second buyer's plan, the first buyer would adopt it and, by "freeloading" on this information, would deter innovators like the second buyer; or, having obtained specific performance, the first buyer would sell the land to the second buyer. "Both alternatives could create transaction costs without generating new social wealth."<sup>133</sup> Yet in these circumstances American law allows the first buyer specific performance. Schwartz contends that if specific performance became more widely available, "the litigation and uncertainty costs that [an exception favouring the second buyer's non-fungible use] would generate would probably exceed the excess bargaining costs of making specific performance available in this relatively uncommon situation."<sup>133</sup> Fourth, inflation may rise unexpectedly after the agreement.<sup>134</sup> Rising costs of a construction contract, for example, may be saved through the contractor's breach. The owner whose profits do not rise proportionately may either threaten specific performance or claim damages calculated as the difference between contract price and new market price. Either way, the owner's attempts at sharing the contractor's savings result in costly negotiations.

Yorio<sup>135</sup> finds Schwartz's widget case exceptional: it presupposes an erratically fluctuating market and an opportunistic seller careless of maintaining clients' goodwill in the long term.<sup>136</sup> "Law must make its rules for the ordinary case."<sup>137</sup> More probably, the seller's breach is prompted by his mistaken belief that the buyer lacks a right to specific performance; by production difficulties such as a factory strike; or by an increase in the market price which then remains steady at the time for performance.<sup>138</sup> In the first two cases, the seller opposes specific performance to retain a profit or to minimize costs of hindered performance. In the third, since damages strip him of any profit on a second sale, his resistance probably results from production difficulties. So, if sellers' costs of cover exceed buyers', damages are more efficient than specific performance.<sup>139</sup> Lacking detailed empirical research, Yorio surmises that sellers face higher costs than buyers do.<sup>140</sup> "To begin with, the buyer will usually have developed ongoing business arrangements with his suppliers, such as a line of credit, which may make his cover costs lower than those of the seller." I do not understand this statement: surely the seller must be a supplier of the purchaser. Be that as it may, Yorio then remarks that the seller will have to obtain a substitute, often from a rival;<sup>141</sup> that costs of delivering to the buyer at a distance will exceed the costs of the buyer's obtaining substitutes;<sup>142</sup> and that the seller may still not know the buyer's special needs, particularly if details thereof have been suppressed by a purchasing entrepreneur.

Ulen doubts the conclusion that post-breach costs of specific performance exceed

those of damages.<sup>143</sup> Even if they do, he retorts, "they may be more productive at guaranteeing only efficient breach of contract."<sup>143</sup> They may fall after contracting parties adjust to specific performance as an ordinary remedy. In so far as expended on litigation, they will be lower for specific performance than for damages.

Ulen assumes that negotiation costs remain low after agreement, because the parties have already completed a fair amount of negotiation.<sup>144</sup> Why, then, are the parties litigating rather than settling out of court? Ulen tries attributing this behaviour to uncertainty over the law or its application;<sup>144</sup> or to the parties' ill-humour which prevents further negotiations and reduces the likelihood that an equitable remedy will bring about an efficient result.<sup>145</sup> The advancement of efficiency in the latter case does not require a damages order, provided that the difference between the objective and subjective transaction costs is kept in mind.<sup>146</sup>

Calabresi and Melamed did not distinguish between objective and subjective transaction costs, but for their theory to be a reliable guide to legal efficiency the distinction is crucial. By objective transaction costs I mean the transaction costs that reasonable people in an objectively similar situation would face. The principal determinants of the level of objective transaction costs are the number of parties involved in the potential transaction, the complexity of the exchange envisioned, and the costs of enforcing that exchange. Determining the level of these costs in any given situation is not an exact science. Nonetheless, the conditions under which transaction costs are likely to be high are sufficiently well known that they can be predicted in most instances. Moreover, the concept of objective transaction costs should not arouse much controversy in the law because of its close resemblance to the law's widely-used "reasonable person" standard, itself a measure of objectivity. The more important point here is that the subjective transaction costs of the particular litigants before the court are not, in general, relevant to the court's goal of fashioning an efficient rule of contract law. This means that whether the particular breacher and breachee before the court are still on speaking terms should *not* guide a court in choosing its remedy.

Ulen qualifies the last sentence with a footnote: "This is not to say that there are never any subjective conditions or attributes of the disputants that should be counted as transaction costs in applying the rule by Calabresi and Melamed."<sup>147</sup>

Ulen then discusses the criticism that the parties' strategic behaviour, the manoeuvring of each for the lion's share, may cause misunderstanding and frustrate a deal.<sup>148</sup> Confident that assets eventually reach the user valuing them most, Ulen regards strategic behaviour-- haggling-- as characteristic of voluntary exchange: a party who rejects further negotiation may have decided that it will not improve on the contentment he presently enjoys; or, by the tactic of simulated withdrawal, he may be

attempting to prize more information out of his opponent, and may subsequently consent to advantageous terms. Haggling usually occurs when seller and first buyer are dividing profits from the transfer of property to a second buyer who has offered a higher price. "[T]he most that can be said against [strategic behaviour] is that it will frustrate redistribution of that surplus, not that it will frustrate an efficient exchange."<sup>149</sup>

Court costs<sup>150</sup> of specific performance and of damages are usefully compared, not in a legal system requiring a plaintiff intent on specific performance to show the inadequacy of damages, but by contrasting a system which routinely provides specific performance with a system which routinely provides damages. In the former system, courts unable to discover guidance from the contract terms face a difficult job of determining the consumer surplus of an aggrieved party tempted to exaggerate his loss. This task, straightforward yet still be carried out in a case involving fungibles from which consumer surplus is usually absent, grows more complicated where non-fungibles are concerned. Two questions must be answered: has the defendant broken the contract? and how much damages will efficiently compensate the plaintiff? Specific performance raises one question: the first. Ulen considers the high costs of monitoring specific performance to have been overstated, for they are limited to contracts of personal services.<sup>151</sup>

Schwartz made four points about the relative costs which buyers and sellers spend on acquiring substitutes;<sup>152</sup> Ulen adds two more.<sup>153</sup> First, the price and contract terms may show that the negotiating parties considered who could cover more cheaply. A seller with this advantage might assume the risks flowing from breach, but would ask a higher price in return. Second, "it is an overstatement to call the post-breach negotiation costs a deadweight efficiency loss in so far as they serve only to redistribute wealth. ... [T]hese short-term efficiency losses may lead to a superior exchange of mutually beneficial promises in the future and so pay for themselves."<sup>153</sup> After a buyer with lower costs of cover than the seller has obtained specific performance, other parties aware of this judgment will, at the conclusion of the contract, discuss who can cover more cheaply. If the buyer can do so, and accepts that risk, he should be offered a lower price. "Both parties are better off knowing that this assignment of risk will save them losses associated with negotiating about the division of the gains from breach";<sup>154</sup> losses caused by uncertainty and litigation about the terms of the exchange.

Next, Ulen discusses the aggrieved party's obligation to mitigate his loss.<sup>155</sup> This principle advances the efficiency of damages but conflicts with the nature of specific

performance: damages apparently prevent inefficiencies which specific performance allows. "In order to rebut this argument it is necessary to show that specific performance will *not* inefficiently induce promisees not to mitigate their loss";<sup>156</sup> a sentence which demands rereading. The obligation to mitigate, Ulen continues,<sup>156</sup>

should be interpreted to cover not merely the duty regarding the solitary, post-repudiation actions of the promisee but also the duty on both parties to make what Professors Goetz and Scott<sup>157</sup> call a cooperative readjustment. The previous discussion of post-breach negotiation costs has already touched on mitigation in this second, cooperative sense.

The promisee's behaviour is now examined. Suppose that the purchaser breaks a sale of perishables, such as 100 tons of tomatoes at \$10 a ton, on which the seller had expected a profit of \$2,000: a case, Ulen assumes,<sup>158</sup> of lost-volume sales and lost profits. Damages total \$2,000 and incidental costs of attempts at mitigation by other sales. Specific performance appears to result in the seller's leaving the tomatoes to rot or lacking the incentive to resell them; or else, in the buyer's attempting to resell accepted tomatoes for which he has paid \$10,000. In fact, says Ulen, the buyer whose resale costs exceed the seller's, will purchase the seller's right to specific performance by offering \$2,000 and the seller's costs of resale-- the quantum of damages. "Neither remedy is more efficient than the other. ... [E]ven without a duty to mitigate under specific performance, the incentives facing both promisee and promisor will lead to a mitigation of the losses arising from the buyer's breach."<sup>159</sup> Ulen leaves "aside the complex question of whether this seller has really suffered any loss of profits because of the buyer's breach."<sup>160</sup> The complexity of assessing the seller's loss of profits can be seen in articles by Goetz and Scott<sup>161</sup> and by Goldberg.<sup>162</sup>

Ulen's second example, featuring a non-perishable and raising "issues [which] become more complex,"<sup>163</sup> clarifies one issue which emerges from a fanciful assumption intended to justify specific performance. Consider a five-year lease at a fixed monthly rent, and repudiation after two years by a tenant, *R*, for whom the lease has become too expensive. "Under a rule of money damages, [the landlord,] *L* is entitled to his expectancy but has a duty to relet the property in order to mitigate his loss. Generally speaking, *L* may not simply bring an action to collect the remaining three-years' rent."<sup>164</sup> Damages comprise the incidental costs of re-letting, and the difference (if any) between the old and the new rents. To still the fear that a landlord entitled to specific performance would not mitigate his loss, Ulen avers<sup>165</sup> that it

is not all clear that even under money damages *L*'s behaviour will be different when he has a duty to mitigate than when the law imposes no such duty. ... [R]egardless of the contract remedy and of any duties imposed, *L* might want to try to mitigate his losses by reletting his property after *R*'s breach. Assume that under legal relief, *L* is entitled to the remaining three-years' payment on his contract and that there is no obligation on him to minimize his losses. *R*, who now faces the responsibility of paying the remainder of the contract, will attempt to relet the property himself, assuming that he is not prevented from doing so by the terms of the contract. *R* may not be able to relet the property as efficiently, *i.e.*, as cheaply, as could the landlord. Nonetheless, with no duty on *L* to mitigate, *R* will attempt to mitigate *his* losses by reletting the property. It is even possible that, if *L* has an appreciable cost advantage in reletting the property, *R* will pay *L* something less than his cover costs but greater than *L*'s cover costs to induce *L* to assume the duty to find another lessee. Both parties would be better off under such an arrangement than if the inefficient party, *R*, were to attempt the reletting alone.

What this means is that, even under money damages without a duty on the seller to mitigate, there are strong incentives for a mutually beneficial post-breach agreement between buyer and seller to minimize the losses from breach. Precisely the same sort of conclusion follows when the routine remedy is specific performance. If *L* is entitled to that remedy, then after the breach he and *R* stand in relation to each other in exactly the same manner as they did under money damages without a duty on *L* to mitigate his losses. We saw there that a private settlement would minimize losses in precisely the manner envisioned to occur through a legal duty to mitigate; hence it follows that under specific performance there will also be an incentive for *L* and *R* to minimize the losses from breach through a private negotiation that is indistinguishable from a legal duty to mitigate.

The main flaw in this argument is the idea that the private settlement would operate in the same way as the landlord's obligation to mitigate his loss. The landlord's obligation goads him into reducing his loss; absence of the landlord's obligation goads the tenant into reducing his own loss by arranging the settlement. The tenant is more advantageously placed in the first case than in the second, as numbers illustrate. Suppose that under a five-year lease the monthly rent is fixed at \$500, and the tenant breaks the lease after the second year. The landlord stands to lose \$18,000. If rents are rising to \$570 a month, he will prefer to cancel and re-let, so as to suffer no expectation loss and to finish the three years with \$20,520: \$2,520 more than the old lease. If rents stay at \$500 and the property is re-let, he suffers no expectation loss and finishes the three years with \$18,000. If rents fall to \$400 a month, the landlord obliged to mitigate his loss will cancel and re-let; he finishes the three years with \$14,400 and sues his former tenant for \$3,600 in damages for loss of expectation. If absolved from mitigating his loss, however, the landlord, instead of cancellation and re-letting, prefers to claim the agreed money sum of \$18,000. Ulen might plausibly answer that the landlord would in fact re-let, in order to save the vacated property from falling into disrepair. This

result does not necessarily follow. Some units in a block of flats may be allowed to stand empty for a long time: the landlord may earn enough from the rest to offset the loss from the vacancies and then sue for the rent arrears after three years have passed. If the lease of a house is broken, he might post guards to deter vandals and squatters, spend his own money on maintenance, and content himself with a net profit from the rent arrears; or he might go further by selling the property and pocketing the sale price and the rent arrears. Again, he might simply allow the property to deteriorate, sell to a developer after three years, and collect a lower price and the same arrears of rent.

Ulen proposes that a tenant would mitigate his own losses by re-letting the premises. By this is meant, one assumes, a sublease rather than the substitution of the tenant by another. A tenant who continues as a link in the chain of the lease stands to profit by asking a sub-rent higher than his own rent; but this offer would be accepted only if the demand for rented property were so considerable as to override the objections of prospective subtenants who had discovered the discrepancy.

If the tenant wishes to have nothing more to do with the lease, though, Ulen's scheme is harsh. That is the law, he may reply. Yet, as money is considered the most fungible of all goods in a domestic economy<sup>166</sup> which would otherwise function by the laborious method of barter,<sup>167</sup> one tenant's money is as good as another's; and the argument in favour of the landlord's mitigation by re-letting the property gathers strength. Ulen observes the close link between the relative costs of cover and the mitigation principle:<sup>168</sup> the debate over which party to a sale enjoys the lower costs of cover is matched by a similar debate concerning the parties to a lease. Yorio might perhaps,<sup>169</sup> after conceding the necessity of empirical research, surmise that the cost advantage would normally fall to the landlord. Many landlords retain a property agency to supervise the lease on their behalf. An efficient agency will be able to re-let the property at lower cost than would a tenant. The tenant (unless a property agency itself) will lack a waiting-list of prospective tenants and a comparable knowledge of current rents, rent control, and landlord's rights against and duties towards a subtenant. The tenant (with the same exception) may work in a different field, and have no inclination whatever to shackle himself with the problems of answering the subtenant's complaints about the fabric of the property, which they both agree should be improved by the landlord, or the complaints about neighbours in the block of flats, perhaps, with whom the tenant has no contract and who must be admonished by the landlord or the letting agency. The tenant may also have to confront the problems of a subtenant who pays the sub-rent tardily or not at all, or whose noise calls down on the tenant's head the

unwelcome attentions of the landlord, the letting agency, and the police.

Where the landlord does not retain a letting agency, however, Ulen might argue that the landlord does not enjoy a significant advantage in the costs of re-letting the property. Yorio might reply that a tenant who can bring the landlord another suitable tenant as a replacement (rather than as a subtenant) will do so out of self-interest, in order to minimize the damages payable for the landlord's loss. Consequently, a failure to proffer a replacement may derive from the tenant's belief that the landlord has the advantage in the costs of re-letting and should proceed with mitigation of loss rather than its exacerbation through haggling over who should re-let the property and pay for this step. The landlord has acquired some knowledge of the relevant law and market conditions before concluding the lease now broken; knowledge which remains useful in his attempts at making a new lease,<sup>170</sup> and which it would require time and money for the tenant to acquire, at some cost, therefore, to himself.

If Ulen demurs that the tenant may never actually have to re-let the property, and that the landlord's right to specific performance serves merely to strengthen his hand in the subsequent negotiations over the costs of re-letting, the answer may be returned that such a right, if not later enforced, leads to costly shadow-boxing between the parties which the rule on mitigation prevents. Ulen's proposal forces the tenant into a settlement with the landlord, on pain of becoming a landlord himself or of incurring a judgment debt grossly disproportionate to that reduced by the mitigation rule.<sup>171</sup> Paying the landlord, under the settlement, to find another tenant is inefficient and wasteful. Only if the tenant could find a replacement tenant more cheaply than the landlord would efficiency be served by a rule the practical effects of which drive the tenant to mitigate his own losses by mitigating the landlord's. It has been surmised that, unless a property agency, the tenant will not be able to re-let as cheaply as the landlord. As ordinary tenants outnumber letting agencies, the mitigation rule should oblige landlords rather than tenants.

Ulen then discusses consequential damages.<sup>172</sup> The first rule of *Hadley v. Baxendale*<sup>173</sup> confines the defendant's liability to loss reasonably foreseeable when the contract was made; the second rule extends his liability to loss which the plaintiff told him about at that time and persuaded him to assume liability for.<sup>174</sup> Specific performance seems to allow the plaintiff a claim for his entire loss.<sup>175</sup>

Ulen replies that after a few judgments of specific performance as the ordinary remedy had in effect compensated plaintiffs for loss unforeseen and unmitigated, parties negotiating contracts would impose their own safeguards and limits by waivers of



liability for consequential damages and by clauses about liquidated damages; and a party agreeing to bear the risk for all the loss would charge the other a higher price.<sup>175</sup> Two criticisms are possible. First, Schwartz<sup>176</sup> promoted the wider availability of specific performance partly because it would save parties time and money spent negotiating complicated clauses about liquidated damages-- yet here such clauses reappear. Second, Ulen's point about the higher price makes sense if the buyer is the potential defaulter; if the seller is the potential defaulter, ought the price then to be lowered?

Ulen goes on to say<sup>175</sup> that

the situation in which the breachee recovers both foreseeable and extraordinary losses under specific performance is never likely to arise: ... [where] losses have already been incurred and there is no physical way in which performance can be completed by the breacher, specific performance would not be a viable remedy. Money damages will have to do.

Of the standard defences in Anglo-American law to an action for specific performance, the one most thoroughly debated is that allowing judges to refuse the remedy if the costs of supervising its execution would be prohibitively expensive.

The common explanation of the defence, says Kronman,<sup>177</sup> is that

private individuals should not be allowed to shift the special costs associated with this form of relief to the taxpayers who subsidize the legal system. The assumption on which this argument rests, however, may be mistaken. It is ancient dogma that specific performance necessarily means increased judicial involvement in the enforcement and supervision of contractual duties. This might be true, but so might the opposite conclusion: if all promises were specifically enforceable, or if private parties were permitted to contract into a specific performance rule at their discretion, a resulting increase in the voluntary transfer of contractual rights might lower the number of breaches-- and perhaps of law suits-- and in this way reduce the actual involvement of courts in contractual relationships.

Schwartz would restrict the defence of high supervision costs.<sup>178</sup> As "it is often difficult to know whether the costs to courts of allowing ... specific performance ... would exceed the gains resulting from increased availability of the remedy,"<sup>179</sup> in cases of doubt the relief which compensates the plaintiff more accurately-- specific performance-- should be granted. Further, the costs to the parties will be incurred only if the parties see them as exceeded by the gains of specific performance.

Courts may lose face from inability to enforce decrees of specific performance, and also have to deal with an increase in litigation. Yet they already make the effort to

enforce anti-racial and anti-trust legislation in the United States; and though they would have to give more time to framing and supervising decrees for specific performance, instead of deciding other cases, they might, perhaps, work harder to dispose of the increased litigation,<sup>180</sup> and could delegate matters to special masters.<sup>181</sup> "This practice would also shift any additional resource costs of specific performance primarily to the parties. Masters can be used to fashion decrees, as well as to supervise performance and hear appeals respecting compliance."<sup>182</sup> Which party should pay for the master's services? This fee may, under the contract terms, have been included in the price. If such information is lacking, a decision about liability becomes difficult. In the practical context usually creating problems of supervision-- construction contracts-- contractors know more than hirers do about the likelihood of breach, the competence and reliability of various firms, and significance of the market information. The contractor should pay the master's fee.<sup>183</sup>

Schwartz then examines the difficulty of supervision.<sup>184</sup> Specific performance is often refused on grounds which he questions. The decree would not be in the promisee's best interests; but the best judge of those is the promisee. The courts' prestige is impugned when their decrees are flouted; yet most businessmen do not breach for ideological reasons and can be expected to obey the decree, and, as scant publicity normally attends contractual disputes, defendants' disobedience would not lower public respect for the courts. Defiance strenuously avowed and prominently reportable would, however, justify refusal of specific performance. Lastly, courts "should not waste judicial resources";<sup>185</sup> but promisees are likely to claim specific performance only where "the gain-- substantial compliance by the promisor-- exceeds the associated costs."<sup>184</sup> Cases are rare in which "the cost of a master would be enormous in relation to the stakes at issue, in which the court is aware that publicized noncompliance is likely, or in which the plaintiff is seeking specific performance out of spiteful motives."<sup>186</sup> Normally, plaintiffs should be entitled to choose specific performance.

Yorio counters Schwartz's argument with the remark that "granting specific performance itself consumes considerable resources in tailoring the terms of the decree and in supervising performance by the promisee. Indeed, the costs of these activities will usually exceed the costs of devising and enforcing a damages judgment."<sup>187</sup> And to Schwartz's argument that administrative costs would be lower than the gains from equitable relief,<sup>188</sup> Yorio replies that a promisee allowed to choose specific performance, as Schwartz proposes, would do so when the benefits thereof to him exceed the costs to him. "But his election is unlikely to prove that the *overall* benefits of

specific performance exceed its costs, especially if the administrative costs generated by specific performance are borne by the promisor."<sup>189</sup>

Ulen mentions the criticisms that the costs of supervising specific performance as an ordinary remedy may be exaggerated by defendants so as to cause plaintiffs to prefer damages, and that high supervision costs appear in more contracts than is often supposed.<sup>190</sup> Ulen responds that these high costs are limited to contracts for personal services, which could be excepted from a general rule favouring specific performance.<sup>191</sup> To undermine the second basis of the criticism-- that damages are more efficient-- he plays down the suspected inefficiencies of specific performance as exaggerated: "the contract may never be performed, and if it is, the promisor's regard for his professional reputation and future employability will temper the incentive to misperform the contract."<sup>191</sup>

The first of these reasons is developed as follows:<sup>192</sup>

[S]pecific performance, like injunctive relief, should be understood as an instruction to the litigants to use the market, rather than the court, to solve their dispute. There is every reason to believe that if *B* is awarded a decree of specific performance against *A* to play Hamlet, the two will begin negotiations to resolve the dispute, with *A* presumably willing to pay *B* not to exercise his right to the contractual promise. *B*, for his part, may be willing to exchange that right rather than run the risk of incurring large expenses in policing *A*'s portrayal of Hamlet. That is, it may be mutually beneficial to promisor and promisee to bargain out of performance. Although it is difficult to know a priori when this will happen, the possibility that there will be no performance in the circumstances in which supervision costs of the performance would be high should lessen the concern about the inefficiencies that might result. Indeed, it may be that the proper way to consider the problem of high supervision costs is not that it puts extraordinary burdens on the legal system but rather that it merely gives the breacher a much better bargaining position in the post-breach negotiations than would be the case under a contract in which the quality of the breacher's performance was not solely in the breacher's hands. If that is the proper economic analysis of the matter of high supervision costs, then it may well be that specific performance is the preferred remedy there, too. Assuming that the promisor makes a credible threat that supervising the quality of his performance will be high, then the worst that can happen to the promisee is that he accepts, in return for not enforcing his right to specific performance, a price that reflects the contract price less the anticipated supervision costs. Such a conclusion would serve as an inducement for future contracts regarding personal services, or other high supervisory cost activities, to include liquidation clauses specifying responsibility for the costs of monitoring performance. Alternatively, promisees in situations of high supervision costs will discount the contract price they are willing to give a promisor by the probability of breach and by the level of anticipated supervision costs.

Ulen's analysis of the court's decree as an instruction to the parties to use the market overlooks the fact that if they had used the market they would not be in court, litigating about specific performance and the defence of high costs of supervision, but more probably would have settled out of court for the amount of damages covering whatever loss the promisee had suffered by engaging another contractor or employee in mitigation. If by "using the market" Ulen means that the parties should negotiate further with each other, it may be answered that such negotiations form a bilateral monopoly.<sup>193</sup> As Koutsoyiannis explains:<sup>194</sup>

Bilateral monopoly is a market consisting of a single seller (monopolist) and a single buyer (monopsonist). ... The equilibrium in such a market cannot be determined by the traditional tools of demand and supply. Economic analysis can only define the range within which the price will eventually be settled. The precise level of the price (and output), however, will ultimately be defined by non-economic factors, such as the bargaining power, skill and other strategies of the participant firms. Under conditions of bilateral monopoly economic analysis leads to *indeterminacy* which is finally resolved by exogenous factors.

And at 465:

The power of each participant is determined by his ability to inflict losses to the opposite party and his ability to withstand losses inflicted by the opponent. Thus the possibility of a strike (by labour) or a lock-out (by firm), the financial position of the union and the firm, the general attitude of the public towards a possible strike or lock-out, and other factors play an important role in determining the bargaining process of the two monopolists.

Since bilateral monopoly is an uncertain arena in which the laws of supply and demand commonly associated with the idea of economic efficiency do not operate, it is questionable how far the courts should encourage the strife generated by this peculiar kind of market. The tone of Ulen's argument shifts from major to minor key: there is "every reason" to expect such negotiations; then it is "difficult to know a priori" whether these will be mutually beneficial to the parties; then "the possibility" of no performance when supervision costs would be high "should lessen the concern about the inefficiencies that might result." Yorio might reply that law "must make its rules for the ordinary case",<sup>137</sup> requiring probability rather than possibility if concern about resultant inefficiencies is to disappear.

For surrendering his right to specific performance, Ulen's promisee would accept a sum calculated as the contract price less the expected costs of supervision. What

calculates those costs? The promisee, one assumes; the promisor, as Ulen had remarked,<sup>195</sup> would exaggerate them as a spoiling tactic. The promisee is more likely to reach a correct assessment of the costs to himself than of the costs to the promisor, the court, and therefore to the other taxpayers who subsidize the administration of justice as a public good.<sup>196</sup> Ulen's endorsement of Schwartz's proposed delegation to masters is perhaps intended to meet this criticism.<sup>197</sup> The snag is that someone has to do the delegating. If, as seems obvious where the parties have not agreed on an arbitrator who might delegate the case to a man of skill, the delegator is a judge, then the costs of supervision, though reduced, are not reduced to the extent that the supporters of the damages remedy might require.

Ulen says that future contracts would include liquidation clauses specifying responsibility for supervision costs. Routine availability of specific performance, Schwartz had argued,<sup>198</sup> would save parties the costs of negotiating clauses about liquidated damages; a saving which the detailed arrangement of the liquidation clauses proposed by Ulen would here nullify.

Ulen considers that the force of competition would constrain an actor to play Hamlet as well as he could, for the sake of protecting his future employability rather than his person from a sentence for contempt of court.<sup>199</sup> This suggestion does not answer the problem raised previously by Ulen of how some performances may be so complex as to defy effective supervision. "How far should the court go?" he asks,<sup>200</sup> in connexion with the role of Hamlet, "Should it specify gestures, grimaces, smiles, tones of declamation? The problem is a real one that the design of efficient remedies must seriously confront." It is thought that the difficulty of supervision will be more easily resolved the more humdrum and quotidian the task, and the more it lends itself to objective assessment on scientific principles by a third person, whether judge or master. A contract to build a potting-shed, for example, can be examined for soundness by the local authority's architect; but the additional flair needed for designing an opera house in Edinburgh would be more difficult to judge because more controversial. Further, Ulen's suggestion that the force of competition may solve the problem of the temperamental actor does not seem readily applicable to other forms of artistic endeavour in which the worker's greatest rival is himself. If disputes arise over the completion or quality of the first draft of a book, for example, the court or master would preside as a critic. Does strength of plot redeem the weakness of characterization, and vice versa? Is the theme trite, unfashionable, or obscure? How does one specify requirements for a satisfactory ending to a stream-of-consciousness

novel? Is not some work efficiently completed by the clunk of the dustbin lid?<sup>201</sup> The more cultivated the judge or master, the more quickly he would shrink from the difficulties and the presumptuousness of doubling as sergeant-major of the Muses and official *arbiter elegantiae*.

## Conclusion

Some may doubt whether either side of the above debate has presented a winning argument.

The economic approach itself may be impugned.<sup>202</sup> Model-building and the differences between positive and normative, let alone descriptive, economics are unfamiliar to lawyers, as the sometimes unfair criticism muddling purposes and methods shows.<sup>203</sup> Posner exaggerates the analytical power of the economic approach, ignoring some of its limitations. In defence of the law-and-economics movement, however, it should be remembered that he is not its sole representative.<sup>204</sup>

The movement has been cast as conservative and ideologically favourable towards the market over governmental intervention.<sup>204</sup> Yet the maximization principle is a technique used by Soviet central planners in decisions about allocating scarce resources.<sup>205</sup> Economic analysis does compel discussion of the cost and benefits of proposed changes in the law; lawyers too often assume that costs are irrelevant or non-existent, and that some goal can be achieved without sacrifice to another.<sup>206</sup> "Increasing access to the courts, for example, consumes resources that will then be unavailable for other purposes."<sup>206</sup> Economic analysis of any move requires answers to the questions how much will it cost? who pays? and who decides the previous two questions?<sup>207</sup> Supporters of the "Chicago School" remain unconvinced that governmental intervention solves all problems of market failure, and they urge such intervention in order to advance *laissez faire* policies.<sup>208</sup> Veljanovski suggests that further empirical research is needed on the costs and benefits of governmental intervention.<sup>209</sup> Some economics language is unnecessarily confusing when applied by analogy to non-market contexts. Though it seems dehumanizing in its references to a "market for babies," for example, it does confront the existence of such a black market instead of avoiding the unpleasant.<sup>210</sup>

The maximization principle shows more rigour, logic, and clarity of exposition than many alternative approaches; but its power has been exaggerated, for it rests on assumptions and important variables.<sup>211</sup> Objections that it may therefore generate no more than a sterile truism-- "people maximize utility, and what they do is utility

maximizing<sup>212</sup>-- make the point that economic inefficiency becomes a contradiction in terms,<sup>213</sup> mistakes become impossible,<sup>213</sup> and economic efficiency is equated by Posner with the logic of the common law and with morality.<sup>214</sup> Veljanovski calls for increased collaboration between economists and lawyers, and less empire-building arrogance by the economists, particularly in areas not susceptible to market analysis.<sup>214</sup>

Economics needs more rigorous, empirical confirmation of whether many of the predictions made by economists are true.<sup>215</sup> Owing to the lack of such confirmation, Veljanovski in 1982 rated the law-and-economics movement a failure.<sup>215</sup> Two important problems arise here. First, attempts at confirmation may be couched in technical language incomprehensible by the vast majority of lawyers not trained in advanced economics and econometrics.<sup>216</sup> Second, for "the vast bulk of legal questions, 'hard' empirical evidence is unavailable, and it is here that the economic approach encounters serious difficulties. The major difficulty ... is that of designing an appropriate test that will verify or refute the predictions of an economics model."<sup>217</sup> Veljanovski considers normative law-and-economics even more of a failure.<sup>217</sup> A further criticism is that the importance of legal rights is depreciated: rights are not merely factors of production valued according to how far they increase the value of goods and services; they substantially affect the distribution of income and some of them underpin the whole system of the market. Some institutional rules are valued for themselves rather than for what economic efficiency they may advance.<sup>218</sup>

Some readers will perhaps consider that the combination of these criticisms prevents a study of how far specific performance is efficient. *Cadit quaestio*; and jurists must settle for a different way of explaining why damages are awarded in some instances, and specific performance in others. Other readers, however, who see some value in a properly restrained application of the economic theory of law to a field such as contractual remedies which often contains references to the market will say that an analysis based on the market may yield insights into the purposes which those remedies are intended to serve.

Behind the contrast between specific performance and damages is a clash of ethical principles: that the contract-breaker should be allowed, even encouraged, to profit from his own breach so long as the aggrieved party is compensated; or that the contract-breaker should not profit from his own wrong. The latter principle was expressed by counsel for the successful respondent in *Benson*: "The law does not allow a man to take advantage of his own wrong (*Thompson v. Pullinger* [(1894) 1 O.R.] at 229); see *Industrial & Mercantile Corporation v. Anastassiou Bros* 1973 (2) SA at

609A-B.<sup>219</sup>

As Yorio observed,<sup>220</sup> however, the determination to stop a wrongdoer from making a profit is not fully carried through. Not all promises are enforced; the inference is that in those circumstances the plaintiff's action for specific performance must be wrongful, too. Further, the rule on expectation damages sets the quantum as the adverse difference between the contract price and the market price. By the theory of efficient breach, the defendant can pay those damages and still keep a net profit on a second contract. Were the law truly averse to the contract-breaker's profiting from his own wrong, the quantum of damages would be the difference between the two contracts; or else the defendant's profit from the second contract would be attached through a constructive trust imposed by the court.<sup>221</sup> As neither the Scots nor the South African law of damages exerts such a pressure on the contract-breaker, a certain incongruity develops between the rules on specific relief and the rules on damages, particularly because the latter have been adopted from or at least heavily influenced by English notions such as the rules in *Hadley v. Baxendale* and the rule on the mitigation of loss.<sup>222</sup>

Yorio also brings out well the point rarely made in South Africa or in civilian systems that a suit for specific performance, if the consumer surplus on the generic subject-matter of the contract is trivial and easily supplied by market substitutes, is actuated by spite and deterrence.<sup>223</sup> These motives spoil the moral purity of the action based on the morality of promise, and undermine the rationale that the purpose of the remedy is to compensate the injured party-- now become an injuring party in his own way. Attempts at restoring the pristine moral purity of specific performance by averring the inherent importance of enforcing contracts in order to maintain the social cohesion of contract law amount to a "floodgates" argument that without specific performance as primary remedy, the law of contract as known in Scotland and South Africa would vanish. Yet, though the contract of law of these two systems would change, it would not enter a swift decline. Anglo-American law, in force throughout a wide expanse of the globe, has managed quite well with specific performance as subordinate remedy; and, if the highest compliment is imitation, has been confirmed in the commercial efficacy of its approach, perhaps, by the German practice of standard-form contracts excluding specific performance from sales of generic goods such as cereals for which substitutes abound in a market almost perfect.<sup>224</sup> As the majority of contracts are duly performed, it is not necessary that specific performance should be available as the primary remedy.



What, then, prevents our whole-hearted suggestion that South Africa and Scotland should give up talking about specific performance as the primary remedy and follow Anglo-American law? In my opinion, the extensive, interesting debate in this chapter leaves one with no very clear overall picture of the relative costs and benefits of specific performance and of damages. The savings and the costs are stated in a continuing debate, but no way of measuring them is suggested which would enable a litigant to separate them out and compare them and say which remedy is the more efficient. Statements about one set of circumstances tend to be met with counterstatements and factual variations, until the reader is tempted to decide that the appropriateness of the remedy depends on, or should depend on, the particular facts-- a tepid prevarication in the glaring eyes of the disputants on either side who demand a clear and definitive general rule. These rival hypotheses have now to be confirmed and given predictive rigour by the advanced techniques of economics. Ulen is surely right when he says:<sup>225</sup>

Among many other things, we need to know the relative transaction costs of court versus private settlement of breached promises and whether contractual behaviour would become more efficient if those exchanging promises knew that the routine remedy were specific performance. We need to know what sorts of disputes about contract breach are brought to court: do they concern only particular types of commodities or all types? Are they, for example, goods whose elasticity of supply is low or goods whose cross-price elasticity of demand is low? With regard to awards, what percentage is damages? What percentage is specific performance? Do courts usually award expectation loss, or do they use some other standard, and, if so, why?

He goes on to say that one "possibility is a comparison of the disposition of breach of contract cases in common law and civil law countries. Another possibility may be to adopt the methods of experimental economics to test the numerous, complex hypotheses about human behaviour under alternative legal rules."<sup>226</sup> Allowances would have to be made for differences between the economies of, say, Scotland and the United States; but these suggestions do point the way to a numerically testable, rather than an impressionistic and dogmatic comparison between specific performance and damages from the viewpoint of efficiency.

Lacking such mathematically verified research or even the ability to understand it if it were available, I can only venture an opinion on which side of the debate seems to advance the more persuasive argument. Yorio's article is the most comprehensive survey of the equitable and economic reasons for imposing on the scope of specific

performance those limits which obtain in Anglo-American law.<sup>1</sup> Armed with his insights, we look with new scepticism at the judgment in *Benson* and wonder whether the R133,560 in unmitigated loss suffered by the plaintiff, taken together with the litigation fees and the opportunity cost of other cases which might have received the court's attention instead, justified the upholding of the trial court's judgment in terms which dispensed with the "categorization" approach to the remedy in South African law. That approach, developed under English influence, tended to mark out those areas in which specific performance acknowledged a consumer surplus inadequately compensated by damages. In an economy strained by sanctions, inflation, and an unreformed system of taxation, should the plaintiff in *Benson* have been allowed the luxury of spending thousands of rand on vindicating a general principle of contract law, when a little exploration of the market might have saved him, the defendant, and the taxpayer who funds the administration of justice by far the major part of his loss? Should not the market be left to allocate those goods and services which it can allocate with reasonable efficiency? Specific performance may be crucial for the execution of five-year plans designed by communist central planners in a country without a well-developed system of markets;<sup>227</sup> but do not judges, by awarding the remedy when damages and a properly-functioning market enable the plaintiff to obtain a substitute with a comparable amount of consumer surplus, become meddlers with the operation of the market?

Readers not convinced by Yorio might do well to consider *White & Carter (Councils) Ltd.*, the wastage condoned by that decision, and the suggested reclassification of the suit for an agreed money sum as one *ad factum praestandum*, for specific implement.<sup>228</sup> The exercise of judicial discretion to refuse the remedy for the entire contract sum, and to order the plaintiff to seek another contract in the market, would in effect apply the rule that he should mitigate his loss; a rule based on the idea that damages will adequately compensate him. (In support of *White & Carter (Councils) Ltd.*, though, Professor Black asks why, unless the claimant is already working at full capacity, should any new contract be treated as a surrogate for the old one, rather than as additional business? To this searching inquiry, a partial answer may be that the problem presents a clash of two virtues-- hard work by the claimant, and thrift by the court in preventing the wastage which would result if the contract-breaker refused the performance-- and our solution will tend to reflect an instinctive preference for one or other virtue over the other, as much as any strict legal rule either way.) Once it has been applied to generic subject-matter such as money, what logical reason bars its application to other contracts where the plaintiff's consumer surplus could be sufficiently

acknowledged by damages: for example, contracts where the land is intended for resale;<sup>229</sup> contracts for the sale of generic goods; and service contracts the completion of which would be difficult and expensive to supervise? If service contracts are deemed an exception it is because the employee may lose pension rights and other considerable benefits which have accrued over a long time; not because there is a scarcity of potential replacements in an economy weighed down by unemployment.

The relevance of the mitigation principle ramifies through the law of contract. A tenet central to the theory of breach entitles the aggrieved party to choose his remedy. This right of election is consonant with the Anglo-American rule on the specific performance of contracts showing consumer surplus inadequately compensated by damages: for example, land and unique goods. But his right of election conflicts with the Anglo-American rule on generic goods, represented in Scotland by the *obiter dicta* in *Sutherland*,<sup>230</sup> *Davidson*,<sup>231</sup> and *Union Electric*,<sup>232</sup> and in South Africa by passages in Wessels's *Law of Contract*,<sup>233</sup> *Thompson v. Pullinger*,<sup>234</sup> and *R. v. Milne and Erleigh* (7).<sup>235</sup> In *Benson*,<sup>236</sup> Hefer J.A. disapproved of the passages in the latter trio of references, because they expressed a rule which

is a complete negation of a plaintiff's right to select his remedy (cf *Schwartz & Son (Pty) Ltd v. Wolmaransstad Town Council* 1960 (2) SA 1 (T) at 3). ... [The] purchaser of an article which is readily available anywhere has no right to demand its delivery from the seller; he knows that a claim for its delivery will be refused; he has no option but to sue for damages, and his right of election to hold the seller to his contract and to demand performance or to claim damages is rendered completely nugatory (*De Wet and Yeats* [, *Kontraktereg*] at 190)).

Correspondingly, Lord President Dunedin's *dicta* in *Union Electric*<sup>237</sup> would become entirely correct on their own terms: the buyer of ordinary goods widely available in the market has no right to compel their delivery but must abide by the defendant's election to deliver or to pay damages instead. Of crucial importance, then, is the distinction of fact that the statements which accord the pursuer the election of remedies in Scotland appear in cases-- *Stewart*,<sup>238</sup> *McKellar*,<sup>239</sup> and *Mackay*<sup>240</sup>-- which concerned heritage, not moveables. The attempt at distinction, however, is blocked by the decisions of the House of Lords in *Dixon v. Bovill* and of the Whole Court majority in *Dimmack v. Dixon*, where the subject-matter was an ordinary corporeal moveable, iron.<sup>240a</sup>

A further ramification touches the history of specific performance in England. The comparison with specific implement which was undertaken by the members of the Mercantile Law Commission in 1855 was useful and efficient, in so far as the Report

recommended that the common law courts should be empowered to grant the remedy hitherto the preserve of the equity courts.<sup>241</sup> But after the Judicature Acts reorganized the administration of justice so that specific performance became available in any division of the High Court, the parliamentary encouragement announced to the courts by section 52 of the Sale of Goods Act 1893 was mostly vain and a waste of time, as the judicial imperviousness to the section in England has tended to confirm.<sup>242</sup> "You must not waste" is a rule which weighs more heavily on the plaintiff than the rule, "You must keep your promises specifically," weighs on the defendant. And though the rules on the date for assessing the plaintiff's loss were relaxed in *Johnson*,<sup>243</sup> that case involved a sale of land, and the terms of the judgment do not extend to contracts for generic goods, which continue to be governed by the rule on the date of breach.

Yet another ramification touches the double sale where the seller has sold more than once what he still possesses at the time of judgment. During an extremely learned debate in South Africa on whether the first buyer or option-holder of the goods should be preferred to later buyers,<sup>244</sup> Scholtens observed that it "is only when the possibility of specific performance is recognized that the present question may arise, viz. whether the right of a first purchaser prevails over the right of a subsequent purchaser."<sup>245</sup> The judgment in *Benson* has strengthened the precedence of the first buyer over the second. "Professor McKerron," said Mulligan, "in support of his submission that the maxim [*qui prior est tempore potior est iure*] is applicable to double sales, alludes to the English Equity rule that, as between competing equitable rights, the earlier is to be preferred."<sup>246</sup> So English equity prefers the first buyer to the second, provided that the subject-matter of the contract is such as normally displays consumer surplus inadequately compensated by damages. Under the traditional rules of specific performance in England, the chief objection to "gazumping" is that the first buyer is deprived of the house by a later buyer offering more money, and, since land is unique, damages are inadequate. But where market substitutes abound, by the standard rules there is theoretically nothing wrong with "gazumping": if the seller has the money to pay any damages awarded against him to the disappointed buyers, he can court several offerors simultaneously and then deliver to the one making the highest bid-- in the language of economic theory and efficient breach, the seller thus determines which buyer places the highest value on the goods; which buyer has the highest consumer surplus, as measured by willingness to pay. Though the distinction between law and equity is foreign to Scots law, the mitigation principle, applied to generic goods in the manner outlined in *Sutherland*, *Davidson*, and *Union Electric*, would favour the buyer with the highest bid

rather than the prior claim.

There are two complications of the market-based approach to specific performance. First, that approach is based on the idea of consumer surplus, which is measured by willingness to pay. Willingness does not necessarily translate into ability. So the right to specific performance becomes an advantage to a poor person in the event of a double sale. Particularly is this so when the subject-matter of the contract is an object of sentimental affection: damages are not usually awarded for this in England, and might well be undercompensatory if they were. Upholding the right to specific performance here would have a redistributive effect which seems just and equitable. Instances would be rare enough not to upset a general prohibition on the specific performance of a sale of goods; judges would test the genuineness of the plaintiff's case: a poor farm-hand who had trained a horse,<sup>247</sup> for example, would be infinitely more credible than a plaintiff avowing sentimental affection for a box of matches, a toothbrush, or a bar of soap. Supporters of the damages remedy might answer that the redistributive effect is cancelled out by the fact that contracts work both ways, and that actions for specific performance can be brought by the rich against the poor. But some right is better than no right; and, unless the wealth effects of a right to specific performance are judicially recognized in respect of objects attracting sentimental affection, then, in contrast with the poet's elegy, *Grandeur* hears, with a disdainful smile, the short and simple annals of the poor.

Secondly, the buyer of goods who would normally fail to qualify for a judgment of specific performance may attempt to mitigate his loss but find that local or reasonably accessible markets cannot supply him with an adequate substitute. In this event of market failure, he would then have to search further afield. If the defendant still possesses the goods which have been sold to a buyer offering a higher price, should not the first buyer be allowed to enjoin the transfer of those goods until such time as substitutes have been found, the costs of purchase, delivery, customs (perhaps), and all other charges have been established, and the ability of the seller to pay the ensuing total of damages has been confirmed? Present rules on the election of remedies, however, hold the plaintiff to the choice he makes if that is for cancellation and damages: a cancelled contract cannot be resurrected.<sup>248</sup> Therefore, the slightest difficulty in obtaining substitutes in the local market should suffice to render damages inadequate and specific performance competent;<sup>249</sup> and the strict rule on election should be relaxed, to allow the aggrieved party a preliminary investigation of the extent to which substitutes are available and adequate damages can be paid by the defendant.<sup>250</sup> So

long, though, as market substitutes abound and adequate damages can be paid by the defendant, it remains unclear why a legal system which deplores the wastefulness of *White & Carter (Councils) Ltd.* can yet condone the wastefulness of *Benson*. Specific performance as primary remedy remains in conflict with the rule on the mitigation of loss. Readers who spot the resultant absurdities conclude that the mutually conflicting rules on the interpretation of statutes are not the sole instance of a merry jumble in the law.

### Notes

1. Yorio, 82 COLUM. L. REV. 1365 (1982).
2. *Id.*, 1365-6.
3. *Id.*, 1365.
4. *Id.*, n. 6.
5. *Id.*, 1367-76.
6. Schwartz, 89 YALE L.J. 271, 274-8 (1979).
7. *Id.*, 271, 274; Yorio, 82 COLUM. L. REV., 1367 and n. 14.
8. Schwartz, 89 YALE L.J., 274; Yorio, 82 COLUM. L. REV. 1368 n. 19.
9. Yorio, 82 COLUM. L. REV., 1369.
10. *Id.*, 1369-70.
11. *Id.*, 1370.
12. *Id.*, 1371.
13. *Id.*, 1371 n. 32.
14. This word is vague: perhaps Yorio means "prescribed," "laid down," or "provided."
15. *Id.*, 1372.
16. *Id.*, 1371-2.
17. *Id.*, 1373.
18. *Id.*, 1374.
19. *Id.*, 1374-5. Widget: "an unnamed article considered for purposes of hypothetical example": WEBSTER'S NEW COLLEGIATE DICTIONARY 1340 (1977).
20. *Supra* pp. 237-9.
21. *Supra* pp. 386-8.
22. *Supra* pp. 322-9.
23. *Supra* pp. 372-9.
24. *Supra* pp. 379-80.
25. 1863, 2 M. 88, 90.
26. *Supra* pp. 252 *et seq.*
27. 1986 (1) S.A., 780H.

28. See p. 410.
29. D. HUME, A TREATISE ON HUMAN NATURE Bk. III Part I Sect. I (Penguin Classics, p. 521).
30. Holmes, 10 HARV. L. REV. 457, 462 (1897). See, also, O.W. HOLMES, THE COMMON LAW 234-6 (M. Howe (ed.), 1968), and Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903). On "committing" a contract, see the criticism by W.W. BUCKLAND, SOME REFLECTIONS ON JURISPRUDENCE 97-101 (1945).
31. R. POSNER, ECONOMIC ANALYSIS OF LAW 88 (2d ed., 1977); Birmingham, 24 RUTGERS L. REV. 273, 282-4 (1970); Yorio, 82 COLUM. L. REV., 1410 n. 228.
32. C.G. VELJANOVSKI, THE NEW LAW-AND-ECONOMICS; A RESEARCH REVIEW (1982) (hence V, NLE). The book reviews the history, method, theory, literature, strengths, and weaknesses of the law-and-economics movement which has grown up predominantly in the U.S. since the 1960s.
33. V, NLE 19-21; W.J. BAUMOL & A.S. BLINDER, ECONOMICS 14 (3d ed., 1985); P.A. SAMUELSON & W.D. NORDHAUS, ECONOMICS 12 (12th ed., 1985); A. KOUTSOYIANNIS, MODERN MICROECONOMICS 3-4 (2d ed., 1979).
34. V, NLE 21-4; SAMUELSON & NORDHAUS, ECONOMICS 6-7; R.G. LIPSEY, AN INTRODUCTION TO POSITIVE ECONOMICS 4-8 (6th ed., 1983); Ulen, 83 MICH. L. REV. 341, 346 n. 13 (1984).
35. V, NLE 24-5; SAMUELSON & NORDHAUS, ECONOMICS 7, 682; LIPSEY, POSITIVE ECONOMICS 4-8.
36. V, NLE 25-6.
37. *Id.*, 27; BAUMOL & BLINDER, ECONOMICS 14; KOUTSOYIANNIS, MODERN MICROECONOMICS 13 *et seq.*
38. V, NLE 27-9; BAUMOL & BLINDER, ECONOMICS 356-64; SAMUELSON & NORDHAUS, ECONOMICS 409-21; LIPSEY, POSITIVE ECONOMICS 164-84.
39. LIPSEY, POSITIVE ECONOMICS 167.
40. V, NLE 29; KOUTSOYIANNIS, MODERN MICROECONOMICS 45. "Almost 30 years ago, in *The Affluent Society*, John Kenneth Galbraith eloquently pointed out that Americans today have for the most part gone beyond the level of physiological necessity; that often the consumer flits from one purchase to another in response to pressures of fashion and advertising": SAMUELSON & NORDHAUS, ECONOMICS 26. See THE AFFLUENT SOCIETY 129-31, 149-51, 198-9, 232-3 (4th ed., Penguin 1984).
41. LIPSEY, POSITIVE ECONOMICS 53.
42. V, NLE 29-30; BAUMOL & BLINDER, ECONOMICS 34-7; SAMUELSON & NORDHAUS, ECONOMICS 469-72; LIPSEY, POSITIVE ECONOMICS 52-3, 150.
43. V, NLE 30-1.
44. V, NLE 31-4; SAMUELSON & NORDHAUS, ECONOMICS 25-6, 41-6, 59-60; BAUMOL & BLINDER, ECONOMICS 45-6.
45. V, NLE 31; BAUMOL & BLINDER, ECONOMICS 375-6; SAMUELSON & NORDHAUS, ECONOMICS 60-2; LIPSEY, POSITIVE ECONOMICS 92-5. To this law, what are called "Giffen goods" are supposed to form a rare exception: LIPSEY, POSITIVE ECONOMICS 183-4, 197; SAMUELSON & NORDHAUS,

- ECONOMICS 416 n.; KOUTSOYIANNIS, MODERN MICROECONOMICS 26.
46. V, NLE 31; BAUMOL & BLINDER, ECONOMICS 52-4; SAMUELSON & NORDHAUS, ECONOMICS 63-4; LIPSEY, POSITIVE ECONOMICS 92-5.
  47. V, NLE 33; SAMUELSON & NORDHAUS, ECONOMICS 417-9, 431-21, 484; LIPSEY, POSITIVE ECONOMICS 173-5; KOUTSOYIANNIS, MODERN MICROECONOMICS 32-5. For the history of the term, see Harris, Ogus, and Phillips, 95 L.Q.R. 581, 582 n. 10 (1979).
  48. Harris, Ogus, and Phillips, 95 L.Q.R., 582-3.
  49. BAUMOL & BLINDER, ECONOMICS 42-3; SAMUELSON & NORDHAUS, ECONOMICS 28-9.
  50. V, NLE 34-5; SAMUELSON & NORDHAUS, ECONOMICS 483; KOUTSOYIANNIS, MODERN MICROECONOMICS 498 and n. 1, 526; R.E. JUST, D.L. HUETH, & A. SCHMITZ, APPLIED WELFARE ECONOMICS AND PUBLIC POLICY 15-6 (1982); Birmingham, 24 RUTGERS L. REV., 278-80; 49 DUKE L.J. 49, 55 and n. 17 (1969); Linzer, 81 COLUM. L. REV. 111, 113-4 and n. 11 (1981).
  51. V, NLE 35-6 and n.; BAUMOL & BLINDER, ECONOMICS 468-9, 495-8; SAMUELSON & NORDHAUS, ECONOMICS 485-8, 678-9; LIPSEY, POSITIVE ECONOMICS 243-5; KOUTSOYIANNIS, MODERN MICROECONOMICS 154-5; Birmingham, 24 RUTGERS L. REV., 276-7.
  52. V, NLE 36.
  53. LIPSEY, POSITIVE ECONOMICS 242.
  54. V, NLE 37; JUST, HUETH, & SCHMITZ, APPLIED WELFARE ECONOMICS 30-2.
  55. Kaldor, 49 THE ECONOMIC JOURNAL 549 (1939).
  56. Hicks, *id.*, 696.
  57. V, NLE 37; KOUTSOYIANNIS, MODERN MICROECONOMICS 529; JUST, HUETH, & SCHMITZ, APPLIED WELFARE ECONOMICS 33-4; Linzer, 81 COLUM. L. REV., 113-4 and n. 12.
  58. V, NLE 37.
  59. V, NLE 37-8.
  60. Producers' surplus is the area above the supply (or marginal-cost) curve and below the market-equilibrium price. "It is the excess of producers' receipts over the minimum that would have to be paid to persuade them to produce a given quantity": LIPSEY, POSITIVE ECONOMICS 312.
  61. V, NLE 38.
  62. *Id.*, 38-9.
  63. *Id.*, 39.
  64. *Id.*, 40-1.
  65. *Id.*, 41.
  66. *Id.*, 42-4.
  67. Scitovsky observed that losers could bribe gainers not to make the change which was Kaldor-Hicks efficient: 9 REVIEW OF ECONOMIC STUDIES 77 (1941); JUST, HUETH, & SCHMITZ, APPLIED WELFARE ECONOMICS 37-8.
  68. V, NLE 41. The problem of the second-best was identified by Lipsey and Lancaster, 24 REVIEW OF ECONOMIC STUDIES 11 (1956-7).



69. *See, e.g.*, the criticisms of Posner cited by Linzer, 81 COLUM. L. REV., 116 n. 21. Baker, 5 PHILOSOPHY & PUBLIC AFFAIRS 1 (1975) developed two propositions about Posner's approach to law and economics: I. Regarding claims to a right, that claimant will be preferred whose use is productive over that claimant whose use is consumptive. II. Among claimants with consumptive uses, the rich are preferred to the poor. Baker then deduces corollaries: "A. As a general matter, the rich are favored directly by Proposition II and indirectly by Proposition I to the extent that the rich own a disproportionate share of the productive assets, or, more strictly, to the extent that the rich are more likely to be willing and able to buy a right for productive use. B. A person favored in the previous case is progressively more likely to be favored in the next case because" a. if he wants a right for consumptive use, he will be richer because of a previous grant, and because he is richer, the right claimed will be more valuable to him (Follows from Proposition II above). b. given that the rich are more likely to want a right for productive use (see A above), the one who is richer because of a previous gain will be the one more likely to claim the right for productive use, and thus will be favored by the effect of Proposition I" (9-10).
70. V, NLE 42-3.
71. *Id.*, 48.
72. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS I.II.1-4 (The Glasgow edition of the Collected Works Vol. 2, Part 1, pp. 25-7, 1981). *See, esp.*, pp. 26-7: "But man has almost constant occasion for the help of his brethren, and it is vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self-love in his favour and shew them that it is for their own advantage to do for him what he requires of them. Whoever offers to another a bargain of any kind, proposes to do this. Give me that which I want, and you shall have this which you want, is the meaning of every offer; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages." *See, also*, M. & R. FRIEDMAN, FREE TO CHOOSE 1-2, 13 (1980).
73. Coase, 3 J. LAW & ECON. 1 (1960).
74. *Id.*, 15.
75. V, NLE 51.
76. Mishan, 9 JOURNAL OF ECONOMIC LITERATURE 1, 19 (1971), quoted by V, NLE 52.
77. V, NLE 53.
78. *Id.*, 53-4.
79. *Id.*, 54.
80. SHARPE, INJUNCTIONS AND SPECIFIC PERFORMANCE 276-9; Birmingham, 24 RUTGERS L. REV., 284-6; Goetz and Scott, 77 COLUM. L. REV. 554, 558-9 (1977); Linzer, 81 COLUM. L. REV. 111, 114-6; Macneil, 68 VA. L. REV. 947 (1982); Yorio, 82 COLUM. L. REV., 1394-5; Ulen, 83 MICH. L. REV., 342-3.
81. Kronman, 45 U. CHI. L. REV. 351 (1978).

82. Harris, Ogus, and Phillips, 95 L.Q.R. 581 (1979).
83. R. POSNER, ECONOMIC ANALYSIS OF LAW 95-7 (2d ed., 1977).
84. Schwartz, 89 YALE L.J. 271 (1979).
85. Linzer, 81 COLUM. L. REV. 111 (1981).
86. Ulen, 83 MICH. L. REV. 341 (1984).
87. Macneil, 68 VA. L. REV. 947 (1982).
88. *Id.*, 950.
89. *Id.*, 952, 953, 957.
90. Kronman, *supra* note 81, 351-3.
91. Calabresi and Melamed, 85 HARV. L. REV. 1089 (1972).
92. Kronman, 45 U. CHI. L. REV., 355-65.
93. *Id.*, 365-9.
94. *Id.*, 359 and nn. 34-6.
95. *Id.*, 362.
96. *Id.*, 363-4.
97. Harris, Ogus, and Phillips, 95 L.Q.R., 583.
98. *Id.*, 584.
99. *Id.*, 584-5.
100. *Id.*, 587-8.
101. Kronman, 45 U. CHI. L. REV., 365-6.
102. *Id.*, 366.
103. *Id.*, 367.
104. *Id.*, 368.
105. *Id.*, 368-9.
106. Schwartz, 89 YALE L.J., 280-1.
107. *Id.*, 281.
108. *Id.*, 281-2.
109. Yorio, 82 COLUM. L. REV., 1378.
110. *Id.*, n. 64.
111. Ulen, 83 MICH. L. REV., 373-4. Linzer, 81 COLUM. L. REV., 125 had noted that although Kronman had described uniqueness traditionally, his analysis justified an expansion of "uniqueness" to encompass any transaction in which the promisee's damages could not be ascertained by a market valuation.
112. Ulen, 83 MICH. L. REV., 375-6.
113. *Id.*, 374 and nn. 109-14.
114. 5A CORBIN, CONTRACTS para. 1142 (pp. 125-6); Ulen, *supra* note 112, 374-5 and n. 115.
115. Ulen, *supra* note 112, 375 and n. 116.
116. *Id.*, 375.
117. *Id.*, n. 117.
118. *Id.*, 375-6.

119. *Supra* p. 415.
120. In 83 MICH. L. REV., 344 n. 7, Ulen explains consumer surplus and says that in "the law and economics literature, this difference between the market price of an item and the consumer's valuation of it is frequently said to be due to the consumer's 'subjective valuation.'"
121. *Id.*, 378, 376-7.
122. *Id.*, 378-9, 377.
123. RABEL, DAS RECHT DES WARENKAUFS 378.
124. Rabel's n. 1 on p. 378 reads: "Einheitsbedingungen im deutschen Getreidehandel § 27; Rostocker Getreideschlußschein § 10; deutsch-niederländische Verträge und viele andere; vgl. Handbuch des Landesproduktenhandels 1929 [Mit dem ... Kommentar zu den Einheitsbedingungen im deutschen Getreidehandel 2. neubearb. u. erw. Ausg. Berlin 1929]."
125. Rabel, *supra* 19 n. 9, has a n. 2 which reads: "So Herker, Syndikus der Getreidebörse zu Duisberg, in Erläuterung der Rheinisch-westfälischen Handelsgebräuche, Handbuch des Landesproduktenhandels 1929 S. 108 mit folgenden in diesem Zusammenhang interessanten Bemerkungen: "Die Durchführung im Wege des Zwangsverfahrens ist zwar möglich, aber recht schwierig. Immerhin sind die hiesigen Handelsgebräuche nicht dem Beispiel anderer Bezirke gefolgt, die auf den Erfüllungsanspruch überhaupt verzichten haben. Es muß ein falsches Licht auf Gebräuche werfen, die das, was recht und billig ist, berücksichtigen sollen, wenn sie auf ein natürliches Grundrecht verzichten würden."
126. *Supra* pp. 386-8.
127. Schwartz, 89 YALE L.J., 284-6.
128. *Id.*, 286.
129. *Id.*, 287.
130. *Id.*, 287-8.
131. *Id.*, 288-9.
132. *Id.*, 289-90.
133. *Id.*, 290.
134. *Id.*, 290-1.
135. Yorio, 82 COLUM. L. REV., 1382 and n. 82.
136. The implication of Yorio's n. 82, *supra id.*, seems to be that the chance of profiting from efficient breach seldom induces sellers to break their contracts; so the market-price rule on expectation damages is a just measure of compensation for buyers. But this implication seems to undermine the attractiveness of efficient breach for sellers.
137. *Id.*, 1382.
138. *Id.*, 1382-3.
139. *Id.*, 1383-4.
140. *Id.*, 1384.
141. Not necessarily: the seller may simply have to buy from a different wholesaler.
142. Yet these costs of delivery will probably have been included in the total price, which the buyer is willing to pay. Yorio's point is sound, though, if delivery costs rise between the dates of contract and performance.

143. Ulen, 83 MICH. L. REV., 379.
144. *Id.*, 380.
145. *Id.*, 380-1.
146. *Id.*, 381.
147. *Id.*, n. 131.
148. *Id.*, 381-3.
149. *Id.*, 383.
150. *Id.*, 383-5.
151. *Id.*, 385.
152. *Supra* pp. 418-9; Ulen, 83 MICH. L. REV., 386-8.
153. Ulen, *supra* note 152, 388-9.
154. *Id.*, 389.
155. *Id.*, 389-93.
156. *Id.*, 390.
157. Goetz and Scott, 69 VA. L. REV. 967, 973 (1983).
158. Ulen, 83 MICH. L. REV., 390-1 and n. 162.
159. *Id.*, 391.
160. *Id.*, 391 n. 162.
161. Goetz and Scott, 31 STAN. L. REV. 323 (1979).
162. Goldberg, 57 S. CAL. L. REV. 283 (1984).
163. Ulen, *supra* note 158, 391.
164. *Id.*, 392.
165. *Id.*, 392-3.
166. Thus we exclude problems of foreign-exchange markets and control, and disinvestment.
167. BAUMOL & BLINDER, ECONOMICS 221-2; LIPSEY, POSITIVE ECONOMICS 59-60, 568; SAMUELSON & NORDHAUS, ECONOMICS 266-7 (giving Jevon's amusing example of Mlle. Zélie's performance in the Society Islands).
168. Ulen, 83 MICH. L. REV., 391 n. 163.
169. *Cf.* Yorio, 82 COLUM. L. REV., 1384-5.
170. *Cf.* Kronman's remark on fungible goods, *supra* 415.
171. The disproportion increases the less the contract price differs from the market price at the time of breach or cancellation, and the longer the period for which the contract is to run.
172. Ulen, 83 MICH. L. REV., 394-6.
173. 9 Exch. 341 (1854); 156 E.R. 145.
174. Ulen, *supra* note 172, 394.
175. *Id.*, 395.
176. Schwartz, 89 YALE L.J., 291-2 and nn. 57-8.
177. Kronman, 45 U. CHI. L. REV., 373.

178. Schwartz, 89 YALE L.J., 292-6, 304-5.
179. *Id.*, 293.
180. *Id.*, n. 65, referring to Gillespie, 5 J. LEG. STUD. 243 (1976).
181. Schwartz, 89 YALE L.J. 294 and n. 66.
182. *Id.*, 294.
183. *Id.*, 294-5.
184. *Id.*, 304-5.
185. *Id.*, 304.
186. *Id.*, 305.
187. Yorio, 82 COLUM. L. REV., 1386.
188. Schwartz, 89 YALE L.J., 293.
189. Yorio, 82 COLUM. L. REV., 1386 n. 104.
190. Ulen, 83 MICH. L. REV., 398-9.
191. *Id.*, 399.
192. *Id.*, 399-400.
193. POSNER, ECONOMIC ANALYSIS OF LAW 97.
194. KOUTSOYIANNIS, MODERN MICROECONOMICS 189.
195. *Supra* p. 428.
196. *Cf.* Yorio's argument, *supra* 406-7.
197. Ulen, 83 MICH. L. REV., 400-1.
198. Schwartz, 89 YALE L.J., 291-2.
199. Ulen, 83 MICH. L. REV., 400.
200. *Id.*, 398.
201. *Cf.* "The only plea that I shall use for the favour of the publick, is that I have as great a respect for it, as most authors have for themselves; and that I have sacrificed much of my own self-love for its sake, in preventing not only many mean things from seeing the light, but many which I thought tolerable. ... I believe no one qualification is so likely to make a good writer, as the power of rejecting his own thoughts.... For what I have publish'd I can only hope to be pardon'd; but for what I have burn'd, I deserve to be prais'd": THE POEMS OF ALEXANDER POPE, The Preface of 1717 (A one-volume ed. of the Twickenham text with selected annotations; J. Butt (ed.), 1963, p. xxviii).
202. V, NLE 126 *et seq.*
203. *Id.*, 127.
204. *Id.*, 128.
205. *Id.*, 129.
206. *Id.*, 123.
207. *Id.*, 123-4; Leff, 60 VA. L. REV. 451, 460 (1974).
208. V, NLE 129-30.
209. *Id.*, 129.
210. *Id.*, 131-2.
211. *Id.*, 132-3.

212. *Id.*, 133.
213. *Id.*, 134.
214. *Id.*, 135.
215. *Id.*, 136.
216. V, NLE 136-7.
217. *Id.*, 138.
218. *Id.*, 138-9.
219. 1986 (1) S.A., 779D-E.
220. *Supra* 405-6.
221. Constructive trust: *see* Kronman, 45 U. CHI. L. REV., 377 and n. 81, 380-2.
222. S.A. law: Erasmus, 38 T.H.R.-H.R., esp. 278-80, 362-4, 368 (1975); and Joubert, 36 T.H.R.-H.R. 46 (1973) and refs. in the cases cited. Scots law: s. 51, Sale of Goods Acts 1893 and 1979; GLOAG, CONTRACT 688-90 (mitigation), 696-703 (*Hadley*).
223. *Supra* 406.
224. *Supra* 417-8, read with 411 and n. 53.
225. Ulen, 83 MICH. L. REV., 402.
226. *Id.*, 402-3.
227. Grossfeld, 72 YALE L.J. 1326, 1330-1 (1963); Ulen 83 MICH. L.R., 375 n. 116; G. Eörsi, *Contractual Remedies in Socialist Countries*, in VII I.E.C.L. ch. 16 153, 155, 179-80; Minan and Morris, 19 GEO. WASH. J. INT'L L. & ECON. 1, 18 (1985).
228. *Supra*, introduction.
229. *Heron Bay Investments Ltd. v. Peel Elder Developments Ltd.* (1976), 2 C.P.C. 338, 339 (Ont. H.C.); *Chaulk v. Fairview Constn. Ltd.* (1977), 14 Nfld. & P.E.I.R. 13, 21 (Nfld. C.A.); *Zalandek v. De Boer* (1981) 33 B.C.L.R. 57 (B.C.A.C.); *McNabb v. Smith* (1981), 124 D.L.R. (3d) 547 (B.C.S.C.), 132 D.L.R. 1982 (3d) 523n. (B.C.C.A.); 306793 *Ontario Ltd. v. Rimes* (1979), 100 D.L.R. (3d) 350, 352; *Prittle v. Laughton* (1902), 1 O.W.R. 185, 187 (Div. Ct.); *Brenner*, 24 MCGILL L.J. 513 (1978); *Berryman*, [1984] CONV. 130; SHARPE, INJUNCTIONS AND SPECIFIC PERFORMANCE 315-9; JONES & GOODHART, SPECIFIC PERFORMANCE 93-4.
230. 1860, 22 D., 671.
231. 1889, 30 S.L.R., 4-5, 6-7.
232. 1913, S.C., 958.
233. WESSELS, THE LAW OF CONTRACT para. 3137.
234. 1 O.R., 301 *per* Kotzé C.J.
235. 1951 (1) S.A., 873, *per* Schreiner J.A.
236. 1986 (1) S.A., 784C-D.
237. 1913 S.C., 958.
238. 1890, 17 R. (H.L.), 11.
239. 1928 S.C., esp. 523-4.
240. 1967 S.C. (H.L.), 60.

- 240a. *See* 1856, 19 D. (H.L.) 9 and 1856, 18 D. 428.
241. *Supra* 183-6.
242. JONES & GOODHART, SPECIFIC PERFORMANCE 115 and n. 18 on judicial imperviousness.
243. [1980] A.C. 367.
244. McKerron, 4 S.A. LAW TIMES 178 (1935); Mulligan, 65 S.A.L.J. 564 (1948); 70 S.A.L.J. 299 (1953); 71 S.A.L.J. 169 (1954); Scholtens, 70 S.A.L.J. 22 (1953); 71 S.A.L.J. (1954).
245. Scholtens, 70 S.A.L.J., 26.
246. Mulligan, 65 S.A.L.J., 574.
247. *Supra* 214-5.
248. *Supra* 261-2, 280.
249. *Cf.* Lesters Leather and Skin Co. v. Home and Overseas Brokers (1948) 64 T.L.R. 569, *per* Ld. Goddard C.J., that the plaintiffs had no obligation to go "hunting the globe to find out where they can get skins" in mitigation of the loss suffered through breach of contract.
250. For suggestions of a relaxed approach to election, based on estoppel of the aggrieved party and detrimental reliance by the contract-breaker, *see* McDougall v. Allen (1922), 65 D.L.R. 320 (N.S.S.C.); Macnaughton v. Stone [1950] 1 D.L.R. 330 (H.C.J.); O'Kelly v. Downie (1914), 17 D.L.R. 395 (Man. C.A.); SHARPE, INJUNCTIONS AND SPECIFIC PERFORMANCE 402-4.

### Conclusion to the Thesis

In the history of Scots specific implement and South African specific performance rests their justification.<sup>1</sup> Specific implement, adumbrated by the Scoto-Norman brieves, was strengthened by the Roman Catholic church's readiness to enforce obligations fortified by oath; and the decrees by the Lords of Council and Session at the turn of the fifteenth century confirmed the existence of the remedy later expounded by the old authorities in reasonably consistent fashion down to the nineteenth century. Specific performance in South Africa was the product of Germanic law; perhaps the influence of canon law; and of an argument rooted in Roman law and occupying the attention of most Continental Romanists from the revival of interest in the *Corpus Iuris Civilis* onwards. Bulgarus's exclusion of the remedy dominated the argument initially; but in Roman-Dutch law as received in South Africa, the opposing view of Martinus in favour of the general competence of the remedy prevailed. The compromise middle way associated with the name of Bartolus, favouring the remedy in sale but not as a general principle, descended into the law of France and of other countries emulating her code.

The modern remedy in Scotland and South Africa during the nineteenth and twentieth centuries has been qualified by the judicial introduction of a power of discretion to refuse it for reasons of practicability and fairness.<sup>2</sup> In Scotland, this power was derived from the inherent jurisdiction of the Court of Session administering law and equity; in South Africa, from comparative reference to Anglo-American law. The ancestry of this power, whether native born or naturalized alien, is not so important as its current breadth in determining the primacy of specific enforcement in the two systems. That the question is not entirely metaphysical looms in the uncertainty over a practical question, the *onus* of proof in South Africa: who bears it? how much has to be established? and how far is the court allowed to exercise its discretion in rescuing a defendant who has raised but failed to prove a defence? Rules, rigid rules, factors, legal and public policy, and the freedom of the court's discretion may need to be considered. The better view is the older view: that the *onus* is on the defendant-- or the defender-- to show why the remedy should be refused in respect of a contract which the claimant has shown to exist.

The grounds of exclusion of the remedy in modern law are important but in some respects worthy of revision. The Scots remedy is in strict theory withheld from obligations to pay money, on the ground that the compulsitor of imprisonment is not lawful.<sup>3</sup> This exception, however, confirms rather than undermines specific implement



as a primary remedy in Romero's first and second senses of the expression "primary remedy", as a matter of doctrine and policy preference: for the defender is compelled to pay, and may not successfully plead unfairness or inconvenience unless he can show that the pursuer lacks a legitimate interest in continuing the contract. *Salaried Staff London Loan Co. Ltd. v. Swears and Wells Ltd.* (1985)<sup>4</sup> indicates a revised approach to this exception, a willingness to redefine specific implement so as to include obligations to pay an agreed money sum, and therefore a growing similarity to South African law.

Impossibility of performance and exceptional hardship are well-established and obvious defences to the Scots and South African remedies.<sup>2</sup>

Difficulty of enforcing the remedy is protean in the two systems. In South Africa, the exclusion has been applied to contracts for building or repair.<sup>2</sup> The uncertainty of the obligations in one Transvaal case,<sup>5</sup> and the adoption of the English rule stated by Fry, created the practice that all such obligations tended to be viewed as uncertain. Divergences appeared, though; punitive resolve has on occasion been uttered by the bench. In this decade De Wet and Yeats's criticism of the rule has been endorsed in an *obiter dictum* by Jansen J.A.<sup>6</sup> and a decision by Coetzee J.<sup>7</sup> Certainty of the obligation is now the determining factor. Judicial appointment of a man of skill when the remedy is granted, as in Scotland, would help to prevent later complications between the parties.

In Scotland, the difficulty of enforcement exclusion has been applied in cases involving defenders absent, corporate, or both. The absent defender, it is submitted, should not be allowed to thwart a possible decree by his absence alone:<sup>8</sup> unless the subject-matter is foreign land (traditionally the preserve of the foreign court), the Scots court should not wax pernicky about prestige but, as a principle of moral suasion, should grant the decree sought, leave the pursuer to enforce it as best he may, and so indicate to the absent defender that the price of reappearing in Scotland is obedience to the decree for specific implement. The defender which is a corporation or unincorporated association and so cannot be imprisoned may be brought within the scope of specific implement by means of an analogy with the decree *ad factum praestandum* ordaining return of the custody of children.<sup>9</sup> This Scots jurisdiction compares with the English in sharing a basis of contempt of court, and a compulsitor, the sequestration of the contemnor's assets. Such a form of sequestration is unknown in South Africa, where specific performance of contract might be strengthened by comparative reference.

Employment contracts have since the late nineteenth century been regarded in

Scots and English law as an exception to the remedy, on the main ground that courts will not interfere with personal liberty.<sup>10</sup> South African practice used to follow the English rule; but today, instead of reasoning that the contract is for personal service and therefore automatically exempt from the scope of the remedy, the judges examine the particular contract to see how continuous, confidential, and personal is the relationship which an order for specific performance would require the parties to maintain. Academic lawyers have observed changed economic conditions of employment in general, and, in Britain, the industrial tribunals' reluctance to order reinstatement of employees unfairly dismissed. South African judges, like their Scots and English brethren, still do not compel employees to work; but, by orders of reinstatement granted to employees wishing to be restored to their jobs and not content with merely being paid wages and fringe benefits, have compelled employers to receive those employees' services. As the Scots judges' aversion to such a result was expressed in cases dating from the nineteenth and early twentieth centuries, sometimes through examples of domestic service, the recent approach in South African merits consideration at least where employees desire reinstatement under commercial contracts of employment today.

Sales of ordinary goods are often thought to form an exception to the general competence of specific implement.<sup>11</sup> In a conclusion appearing separately because of the stress laid in my thesis on this area of the law, the idea has been questioned and, it is submitted, shown to have been aired in *obiter dicta* rather than supported by *rationes decidendi*.<sup>12</sup> These conclusions are not repeated now, but do lead on to the issue of the adequacy of damages-- the central rule of the English remedy of specific performance and the main point of contention in the debate over the economic theory of specific performance in Anglo-American law.

Some of the strengths and weaknesses of the economic theory have been raised, applied, and questioned.<sup>13</sup> Yorio's argument from fairness alerts Scots and South African lawyers to the point that their systems, by providing specific performance as a primary remedy not to be ousted simply by the adequacy of damages, may tolerate a modicum of hardship and unfairness: Gloag's description "exceptional hardship"<sup>14</sup> and Lord Watson's ruling that the legal remedy will be refused only for "some very cogent reason"<sup>14</sup> imply that unexceptional hardship is tolerated by the system, and a cogent or plausible reason does not provide a defence.

Economic efficiency is conceived by economists and then sometimes misunderstood or misapplied by lawyers.<sup>13</sup> One of its justificatory elements, incentive analysis, shows that lawyers and economists tend to approach a legal dispute from

different viewpoints: the economists *ex ante*, the lawyers *ex post facto*. Another discrepancy emerges between the actual increase in Pareto efficiency and the potential increase in Kaldor-Hicks efficiency (the standard applied by the law-and-economics movement): the potential increase of the benefit to society may strike the lawyer as too vague a general purpose on the basis of which to refuse specific performance (or implement) to a claimant who cannot otherwise be met by a very cogent defence of exceptional hardship in the actual dispute between the parties. Moreover, the courts in South Africa and Scotland may be willing to advance justice between the parties even if the remedy is not an economist's zenith of efficiency. The whole economic theory of law needs to be more rigorously elaborated, mathematically refined, for the confirmation of its rhetoric by more substance. Until then, a Scots verdict of "not proven" is advisable; and civilian lawyers may well feel it unnecessary, indeed unwise, to abandon the accepted view of the primacy of specific enforcement in favour of the view of a different family of legal systems, as supported by an economic approach that a leading scholar of the law-and-economics movement could, as recently as 1982, still describe as a failure. The economic approach to the remedy at present offers non-economists no clearly quantifiable idea of the costs and benefits of specific performance or of damages in lieu of performance. Lacking such extra-legal formulae and data, lawyers naturally fall back on the standard doctrines of the systems in which they have been educated and in which they practise and feel most at home.

Because the Scots and South African attitude to specific enforcement of contracts differs from the Anglo-American, there emerge two different views of the nature of a contract. By allowing specific enforcement as a general rule, Scots and South African law emphasize the bindingness of contract, and the court's resolve to protect the promisee's expectation interest in actual form, despite changes in the market and the consequent inconveniences to the defending party-- provided that these are not so wide as to create unfairness or public detriment. Planning is facilitated, and a saving of time spent searching for substitute performance on the market. The Anglo-American view, though not reducing every contract to a bet, is less binding upon the promisor, since as a general rule the parties are implicitly recognized to be hedging against future changes in the market during the period between conclusion of the contract and time set for performance. Each party hopes that the market will not change so greatly as to cause him severe inconvenience. The hopes of both parties can be met only if the market remains unchanged in the relevant period. If it does change, though, one party will be better off, the other worse. The Anglo-American rule on specific performance is

reminiscent of a bet in so far as the adequacy of damages rule contemplates that the "loser" who prefers not to continue the contract must pay the amount by which his hopes have turned out to be misplaced, but does not ordinarily expect to be held to the actual terms of performance if the market is supplying information and another contracting party with whom the "winner" may agree for the desired subject-matter. The Anglo-American general rule requires the plaintiff to be financially compensated for his loss of expectations; the Scots and South African general rule, supported by the potential for imprisoning the party who refuses to perform, requires him to be spiritually reformed--the remedies have a moral, a punitive and expiatory sharpness which is absent from the Anglo-American rule normally a matter of business figures, balance sheets, and market forces. So damages as primary remedy enable-- some adherents of the economic theory would say encourage-- a process of economic liberalism: a man who scoffs at ethical restraints that he should keep his promises may instead break them if he can profit from a more favourable contract. Even if we ourselves may hold ethical views on the importance of keeping our promises, should we infringe the huckster's liberty to break his promises if at the same time his victims can make substitute contracts and then claim damages from him? In the end he may conceivably learn the importance of keeping one's promises in general, if he cannot find people to contract with him because a reputation for untrustworthiness has preceded him. But should he not be allowed the freedom to learn this lesson for himself, rather than having it taught to him by the plaintiff (or the pursuer) and the court in a civil, not a criminal, action? Breaking a contract is not directly a crime; but at one remove it approximates to a crime because the contumacious judgment debtor who fails to obey the court may be imprisoned for contempt. Yet, although the rule on damages adequacy sustains the liberty of the well-heeled, in this bicentennial year the paradox may be noted that specific relief sustains equality, for the contract-breaker's financial power of fobbing off the victim is ignored, and, whether duke or dustman, he who breaks his promise may be held to it if his victim so prefers.

Large questions of morality and freedom therefore stand behind the rules and principles in a legal system on specific enforcement of contracts. Deference to authority and the order created by settled precedent has led me to show how the law of Scotland and of South Africa could be made more effective. Studying the Romanists who followed the view of Bulgarus,<sup>15</sup> however, and the Anglo-American view put forward by Yorio<sup>13</sup> has led me to question whether specific enforcement should be the primary remedy in a modern, secular society when the markets work well. Ambivalence in

certain areas of my thesis will have been noticeable. Bulgarus's exclusionary attitude could be tempered by the rule on market substitutes, to yield a remedy with a strong chance of reflecting many people's choice for resolving their contractual disputes. The idea of *pretium affectionis* would require extension, to take account of the employee's desire for reinstatement and the protection of interests measurable poorly if at all in damages. As Cohen remarks:<sup>16</sup>

A person's job is no longer simply a means of acquiring short-term financial gain. It often represents security in the form of pension and seniority rights, status in the form of community respect and recognition, a sense of camaraderie with one's fellow employees, political influence through union membership, a foundation for marital and familial stability, security in an increasingly transient work force, a position of authority in a union hierarchy, and much more.

Each side of the debate about the primacy of specific performance can put forward powerful arguments and find chinks in the other's armour; over-confident declarations about the inherent rightness of the civilian relief and its tendency to uphold the layperson's opinion that contracts should be kept would ignore the controversy between the Romanists and trivialize an issue not all the nuances of which can be summarized here; and both sides deepen our understanding and enjoyment of a maxim by La Rochefoucauld which brings my thesis to an end: "Nous promettons selon nos espérances, et nous tenons selon nos craintes."<sup>17</sup>

### Notes

1. Chapters 1 and 2.
2. Chapter 3.
3. Introduction.
4. 1985 S.L.T. 326 (1st Div.).
5. *Barker v. Beckett & Co. Ltd.* 1911 T.P.D. 151.
6. *ISEP Structural Engineering and Plating (Pty.) Ltd. v. Inland Exploration Co. (Pty.) Ltd.* 1981 (4) S.A. 1 (A) 5.
7. *Ranch International Pipelines (Transvaal) (Pty.) Ltd. v. LMG Construction (City) (Pty.) Ltd.* 1984 (3) S.A. 861 (W).
8. Chapters 12 and 13.
9. Chapter 5.
10. Chapter 4.

11. Chapter 6 *et seq.*
12. Chapter 16.
13. Chapter 17.
14. Chapter 3.
15. Chapter 2.
16. Cohen, 32 UNI. TORONTO L.J. 31, 67 (1982).
17. F. DUC DE LA ROCHEFOUCAULD, OEUVRES COMPLÈTES Maxime 38 (249).

## APPENDIX A

### Coping with the lack of the *actio quanti minoris* in Scots common law

In *Stewart v. Kennedy* Lord Watson held that Scots law rejected the principles of the *actio quanti minoris*, "for the reason apparently that to assess compensation to the purchaser for part of the estate sold which the vendor has it not in his power to convey would virtually be to make a new bargain for the parties which they had not made for themselves."<sup>1</sup> Forte has argued convincingly that the remedy should be acknowledged in the common law of Scotland today.<sup>2</sup> Until that acknowledgement is made by the House of Lords' overruling the relevant part of Lord Watson's speech in *Stewart*, Scots practitioners must search for other means by which to obtain specific implement of the sale of heritage, and damages from someone for whatever cannot be conveyed. English pleaders' ingenuity when overcoming disadvantages in the old personal actions of debt and detinue by invoking tortious ideas such as trover and *assumpsit*<sup>3</sup> teaches the Scot to examine the law of delict for a possible answer, so as to achieve the effect of the *actio quanti minoris*. The *actio*, being an aedilician remedy, is confined to sale and therefore to contract.<sup>4</sup> The incompetence of this contractual action would be no defence to a delictual action for damages.

The pursuer would allege that through the defender's negligence he has suffered economic loss in not receiving the heritage which cannot be conveyed. Three sets of defenders are possible: (1) the buyer's solicitors; (2) the seller's solicitors; and (3) the seller.

1) The buyer's solicitors, it is submitted, are liable if their client has relied on them to arrange the conveyance of the heritage bought. At least since *Hedley Byrne & Co. v. Heller & Partners Ltd.* the pursuer is no longer restricted to a contractual claim but may sue in delict.<sup>5</sup> The solicitor's liability for negligently failing to convey land on his client's behalf appears from Lord Kilbrandon's speech in the English appeal of *Arenson v. Casson Beckman Rutley & Co.*:<sup>6</sup>

I do not think there can be much doubt as to the nature of the relationship from which such liability [that is, liability in damages arising out of negligence], at least in a case like the present, must be held to arise. It is seen in a wider range of activities, and can by no means be confined today to the relation between a professional man and his client. If I engage a man to exercise his expertise on my behalf, and it matters not whether he is to prepare a conveyance of land or to drive a straight furrow across it, then *spondet peritiam artis*, and *imperitia culpa adnumeratur*.

The solicitor's tortious liability to his own client has been confirmed in the Chancery Division by Megarry V.-C. in *Ross v. Caunters*,<sup>7</sup> following Oliver J. in *Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp*.<sup>8</sup> The requisite degree of proximity is provided by the contract between the solicitor and his client: in *Junior Books Ltd. v. Veitchi Ltd.*<sup>9</sup> one of those in the majority, Lord Roskill,<sup>10</sup> approvingly quoted Lord Devlin in *Hedley Byrne*: "I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care."<sup>11</sup> *A fortiori*, the duty must exist where there is a relationship of contract. Lord Wilberforce's first question in *Anns v. Merton Borough Council* has been answered; now his second arises: "whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which breach of it may give rise...."<sup>12</sup> In *Siraj-Eldin v. Campbell Middleton & Dickinson* the solicitors admitted negligence in failing to plead their client's case for unfair dismissal before an industrial tribunal.<sup>13</sup> The First Division upheld the Lord Ordinary (McDonald) in finding<sup>14</sup> that

the pursuer had failed to prove that he had suffered any loss because he had been denied the chance of presenting a claim of unfair dismissal. In other words the Lord Ordinary formed the opinion, upon the evidence led before him, that the pursuer had no prospects of making out successfully his complaint of unfair dismissal.

The pursuer had taken alcohol on board an oil rig, breaking an invariable ban. This set of background facts, where the pursuer was blameworthy in the circumstances, is distinguishable from the case of the client who breaks no ban in wishing to convey heritage or to have it conveyed to him and so engages a solicitor for the purpose. A solicitor's bungled conveyancing is more comparable with a solicitor's bungled execution of a will: in *Ross v. Caunters* the solicitor cast in damages had been engaged to draw up a will leaving a legacy to the plaintiff, who, owing to the solicitor's negligence, lost the claim to the legacy.

2) *Ross* would also justify the buyer's raising a negligence action against the second set of defenders in the present conveyancing problem: the seller's solicitors. In Scotland, Professor Black tells me, the buyer's solicitors draft the disposition. The seller's solicitors owe their own client a duty to check the documents and save him from delictual actions for negligently causing loss. It is arguable that the seller's solicitors also owe the buyer a similar duty; at the very least, they should warn the buyer or his solicitors about any possible discrepancy between the terms of sale and the heritage which can actually be conveyed. If the seller's solicitors discharge this duty, the problem



of the shortfall of heritage would not arise, and possible discrepancies would no longer be latent, so that in the unlikely event that the buyer, having been appropriately notified by the seller's solicitors, were to sue them, they could plead the defence of *volenti non fit iniuria*.

3) Consideration of the third possible defender-- the seller-- becomes necessary if the contracting parties did not engage solicitors; or if either set of solicitors raises the defence that the pursuing buyer has failed to prove that he would recover delictual damages from the seller, and so has suffered no loss. The question then is: can the seller be sued in contract for specific implement so that he is ordained to convey as much of the heritage as he can, the buyer paying the full price; and can he also be sued in delict for the economic loss which he has caused the buyer through failing to convey that part of the sold heritage which he cannot convey? In *Donaghue v. Stevenson* Lord Macmillan held:<sup>15</sup>

The fact that there is a contractual relationship between the parties, which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, although arising out of a relationship in fact brought about by the contract.

These words seem wide enough to cover the present problem if the buyer and seller have contracted directly, without engaging solicitors. The controversial point lies in answering Lord Wilberforce's first question:<sup>16</sup> does the seller owe the buyer a duty of care to make sure that what is sold can be conveyed? Unless the seller has legal training or a knowledge of the relevant law, there can be no question of *imperitia culpa adnumeratur*, so the pursuer cannot claim to have relied on the defender's legal knowledge and experience-- unless the defender professed knowledge or experience which he did not in truth possess. In *Junior Books* the defenders, specialist flooring contractors not contractually bound to the pursuer, were held liable for economic loss caused by safe but shoddy performance of the contract. The uncertainty in the present problem is whether the Scots court would extend the *Junior Books* policy and hold an ordinary seller liable for the loss caused by safe (in the sense of causing economic loss but not physical or personal injury) but shoddy performance of the sale of heritage.

Not every seller of heritage has legal qualifications or knowledge; nor does the law require these: to apply the maxim *imperitia culpa adnumeratur* would set the standard too high and excessively restrict the delictual liability of the seller who lacks this expertise.

Professor McKerron, the Aberdonian who contributed so much to South African law, and the law of delict in particular, used to tell his students that the more often the law coincided with common sense, the better was the law.<sup>17</sup> As a matter of common sense, therefore, which of the parties to a sale of heritage is likely to know more about the subject-matter, its extent, and the burdens and encumbrances upon it? The seller will tend to know whether the boundary fences accurately demarcate the heritage; and if someone unknown crosses the land more than once without identification and the giving of reasons, then thoughts about trespassers, rights of way, leases, liferents, and squatters' rights loom in the seller's mind. Particularly will this be so, now that the occupier is liable, under the legislation on the community charge (or poll tax), to register those people who live on the premises: the controversy and the penalties for non-compliance will make the seller more conscious of the persons on his property. Even if he does not know the law, he does-- or should-- know about the daily life on the property. The absent owner of heritage may not know very much; but here the knowledge, actual or constructive, of his servants (acting in the course of their employment) and his agents (acting within the scope of their authority) may be relevant-- so that the factor, say, of an estate in the Highlands would or should know about the daily events. Once the requisite awareness can be imputed to the seller, then as a reasonable man<sup>18</sup> he would, it is submitted, take steps to guard against causing loss to the prospective buyer: he would check the title deeds and the land register to see what exactly he could and could not sell, for he would foresee that failure to do so might well mean that the purchase price would otherwise take account of land which he could not convey; and the disappointed buyer would suffer loss perhaps running to thousands of pounds. These checks would not require the seller to take unreasonably difficult, impractical, or expensive steps to guard against negligently causing the buyer loss. Failure to make checks, though, would then cause the loss. If the seller actually knows that the heritage is not as extensive as designated in the sale, or has burdens or incumbrances, and he does not disclose these facts to the buyer, then he is guilty of fraud, which is difficult to prove, however, so that an action for negligence is more convenient for the buyer.

After the first of Lord Wilberforce's questions has been answered, the second<sup>16</sup> would require the consideration whether the delictual liability of the seller should be restricted. The buyer might also be held to have a duty, as a reasonable man about to spend thousands of pounds and consequently to arrange a mortgage requiring years of his life and work to pay off, to see whether he was getting value for that money and future effort. So the way would be opened for a finding of contributory negligence, if

he could have asked to see the title deeds and could have checked the land register to see that he would receive all the heritage for which he would pay; if he should have asked and should have checked, but failed to do so; and as a result was partly responsible for his own loss. Delictual damages would amount to the difference between the purchase price and the value of the land which could be conveyed: put another way, the economic loss of not receiving the part which could not be conveyed. In applying the contributory negligence the court could flexibly apportion the responsibility for the loss: the buyer would probably not receive the full difference between the purchase price and the lessened value of the heritage as he would under the contractual remedy of *actio quanti minoris*; but some delictual damages would be better than nothing at all. The ratio of apportionment between the two parties would depend on the facts: the starkest difference, savouring of sharp practice, would be the legally qualified seller and the illiterate buyer in circumstances of facility and circumvention. A contractual clause excluding all liability for damages in contract and delict would warn most people not to buy the property at all, or else only after thorough examination of the title deeds and land register, and a consultation with their legal adviser-- which is why it is unmeritorious for solicitors who have bungled the conveyancing which they have been engaged to perform, later to plead the defence that the parties to the sale of heritage should have spotted the conveyancing error.

The above argument is tentative, perhaps erroneous. Raising it before the highest courts might at least so horrify those judges resolved to maintain the purity of the difference between contract and delict that they might be driven to review and overrule Lord Watson's prohibition on the *actio quanti minoris* in Scots common law. The difference is maintained in South African law, where the majority decision in *Junior Books* has been rejected by the majority decision in *Lillicrap, Wassenaar and Partners v. Pilkington Brothers (S.A.) (Pty.) Ltd.*<sup>19</sup> Grosskopf A.J.A. for the majority did point out that *concursum actionum* (actions in contract and delict on the same facts) was recognized in Roman and Roman-Dutch law.<sup>20</sup> However, his judgment is jurisprudentially distinguishable from the present problem of Scots law; he held:<sup>21</sup>

In considering whether an extension of Aquilian liability is justified in the present case, the first question that arises is whether there is a need therefor. In my view, the answer must be considered in the negative, at any rate in so far as liability is said to have arisen while there was a contractual *nexus* between the parties. While the contract persisted, each party had adequate and satisfactory remedies if the other were to have committed a breach. Indeed the very relief claimed by the respondent could have been granted in an action based on breach of contract.

In Scots common law the buyer lacks the contractual remedy of the *actio quanti minoris* which exists in South African law: so where Scots contract law does not extend, Scots law of delict should in theory be allowed to fill the gap. Further consideration of the present problem might be an interesting essay for a Scots student, who in regard to policy and aspects of comparative law might care to read the dissenting judgment of Smuts A.J.A. in *Lillicrap* and the articles on the case written by Boberg;<sup>22</sup> Beck;<sup>23</sup> Van Warmelo;<sup>24</sup> and Hutchinson and Visser.<sup>25</sup>

My advice is that if the present problem should befall contracting parties to a sale of heritage who have engaged solicitors, the buyer should claim the conveyance of as much of the heritage as the seller can convey, and pay the price. Then they should combine to sue both sets of solicitors as joint delictual wrongdoers. The pursuers would argue that they had paid for professional competence, and the solicitors' joint negligence caused the buyer economic loss. This claim should stand a greater chance of success than the buyer's controversial action in delict against the seller.

#### Notes

1. 1890, 17 R. (H.L.) 1, 9.
2. Forte, 101 S.A.L.J. 691, 702-3 (1984).
3. *Supra* chapters 7 and 8.
4. For literature, see *Phame (Pty.) Ltd. v. Paizes* 1973 (3) S.A. 397 (A).
5. [1964] A.C. 465.
6. [1977] A.C. 405, 430D-E.
7. [1980] 1 Ch. 297, 308A-E.
8. [1979] Ch. 384.
9. 1982 S.C. (H.L.) 244.
10. *Id.*, 272.
11. *Hedley Byrne*, [1964] A.C., 530.
12. [1978] A.C. 728, 751-2; *Junior Books*, 1982 S.C. (H.L.), 273.
13. 1989 S.L.T. 122 (1st Div.). Professor Black kindly drew this case to my attention.
14. *Id.*, 124E *per* L.P. Emslie.
15. 1932 S.C. (H.L.) 31, 64.
16. *Anns*, [1978] A.C., 751-2; *Junior Books*, 1982 S.C. (H.L.), 273.
17. I was told this by Professor Ivan Schäfer of Rhodes University, one of McKerron's former students.
18. The reasonable man was memorably described by Holmes J.A. in *S. v. Burger* 1975 (4) S.A. 877 (A) 879D-E: "One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution.

headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a *diligens paterfamilias* treads life's pathway with moderation and prudent common-sense."

19. 1985 (1) S.A. 475 (A).
20. *Id.*, 496.
21. *Id.*, 500E-F.
22. Boberg, 102 S.A.L.J. 213 (1985).
23. Beck, *id.*, 222.
24. Van Warmelo, *id.*, 227.
25. Hutchinson and Visser, *id.*, 587.

## APPENDIX B

### Kerr's authority on the date for assessing the buyer's compensatory damages in South African law

In *The Law of Sale and Lease*, Kerr says:<sup>1</sup>

In the text above at 106-109 it is pointed out that the operation of the rule on mitigation of loss calls for, *and the weight of authority is in favour of*, calculating the value of the thing sold but not made available with reference to the date of cancellation, or, if the facts warrant it, the date on which cancellation ought to have taken place, a little latitude being allowed for alternative arrangements to be made.

Kerr's argument at 106 to 109 is correct; but the words which I have italicized need qualification in the light of the cases to which he refers. He does not discuss most of the South African cases which I have cited,<sup>2</sup> and seems not to have considered that, after *Katzenellenbogen Ltd. v. Mullin*,<sup>3</sup> he bears the *onus* of proving that cancellation date should supplant breach date as the time for assessing the adverse difference between contract and market price. It is submitted that, on the authority which he mentions, the italicized clause would need to be rewritten as follows: "and the weight of the argument is in favour of": for, although his argument is preferable to the rationale of assessment at date of breach, his authorities prove less numerous and more restricted than he avers. He relies on four cases: *Celliers v. Papenfus and Rooth*;<sup>4</sup> *Inhambane Oil and Mineral Development Syndicate v. Mears and Ford*;<sup>5</sup> *Cooper v. Kohn's Produce Agency Ltd.*;<sup>6</sup> and *Whitfield v. Phillips and Another*.<sup>7</sup>

*Inhambane* was a redhibitory action for rescission of the sale and restitutionary damages for the expenses such as buying and maintaining a drill. De Villiers C.J. himself recognized that restitutionary damages differed from compensatory damages; see his interjection to counsel.<sup>8</sup> So, for compensatory (loss-of-bargain) damages, the quotation in Kerr, *Sale*,<sup>9</sup> can be no more than an *obiter dictum*.

In *Celliers* Innes C.J. said: "In the present contract there has been no time fixed for delivery, and ... in such cases ... the buyer should take some action to fix the date at which his damages are to be calculated."<sup>10</sup> This aspect of *Celliers* was remarked on by Trollip J.A. in *Novick v. Benjamin*.<sup>11</sup> It is questionable whether *Celliers* governs the different position where the contract does fix a date for performance and time is of the

essence (either because of a *lex commissoria* or, perhaps, because of the mercantile nature of the contract) and the defendant is *in mora* once this date passes.<sup>12</sup>

In *Cooper* Bristowe J. held<sup>13</sup> that damages were

the difference between the contract price and the market price on the day for fulfilment of the contract or the day of repudiation *whichever occurs last* (Maine on *Damages* 7 ed. 181), a little latitude being presumably allowed to enable the party injured to buy or sell similar goods in the market as the case may be.

The problem here is deciding whether "repudiation" means "lawful cancellation" or "unlawful rejection".<sup>14</sup> In *Sale* Kerr thinks that Bristowe J. meant "lawful cancellation."<sup>15</sup> But this interpretation conflicts with the Agency's summons that "on the 11th January the defendant repudiated the contract and refused to accept delivery of the mealies",<sup>16</sup> and also with two statements by Bristowe J.: "they received a telegram from the defendant himself definitely repudiating the contract"<sup>17</sup> and "the repudiation came to their knowledge on the 11th and they could have sold on that day or at the latest on the 12th."<sup>18</sup> Furthermore, in *Bremmer v. Ayob Mahomed & Co.* Lange J. doubted whether *Mayne on Damages* supported Bristowe J.'s *dictum*:<sup>19</sup> and the court in *Bremmer* sought to limit the *dictum* to anticipatory breach and declined to apply it where the repudiation had occurred after the time of performance.<sup>20</sup> Kerr lacked the seventh edition of *Mayne*,<sup>21</sup> which, as relevant to damages,<sup>22</sup> reads:

The defendant may refuse to accept the goods. [The plaintiff] may ..., after the time for performance has expired, or any other essential condition has been broken, sue for breach of the contract, even after he has resold the goods.<sup>23</sup> In the latter case, the measure of damages is the difference between the contract price and the market price at the time when the contract ought to have been completed ...,<sup>24</sup> for the seller may take his goods into the market and obtain the current price for them....<sup>25</sup>

*Boorman v. Nash*<sup>24</sup> and *Barrow v. Arnaud*,<sup>25</sup> cited by *Mayne*, support breach-date assessment. Lange J.'s doubts were therefore well founded. In *Cooper*, Bristowe J. cited mutually conflicting cases as supporting a rule in common: *Celliers* (on cancellation-date assessment) and *S.A.R. v. Theron* (on breach-date assessment).<sup>26</sup>

Yet, if "repudiation" meant "unlawful rejection," then perhaps the *dictum* could be limited to the facts of *Cooper*. There may have been an unlawful rejection by Cooper on 9 January; a lawful cancellation by the Agency on 9 January; but doubt

whether the cancelling letter had reached Cooper by the time he sent his repudiating telegram; so that 11 January was accepted as the date when the cancellation was deemed to be effective and the rule on mitigation applicable-- and so stringently applicable that, in Bristowe J.'s view, a reasonable period was two days at most. In *Novick Trollip J.A.* left the correctness of *Cooper's* decision open.<sup>27</sup> *Cooper* is a puzzling case.

In *Whitfield* the meaning of "repudiation" is once again in issue; but here it is discoverable. Kerr, *Sale*, again interprets it as "lawful cancellation";<sup>28</sup> and I agree that Hoexter J.A. used it in this way,<sup>29</sup> for he applied *Celliers* and consistently assessed the damages as at 30 October.<sup>30</sup>

But I disagree with Kerr that the other judges also assessed damages as at the date of cancellation. The declaration by the plaintiffs-respondents alleged that the defendant wrongfully and unlawfully repudiated the agreement on 15 October and that on 30 October the plaintiffs elected to accept this repudiation under reservation of their rights to claim damages from the defendant.<sup>31</sup> Steyn J.A. held that "where the purchaser [here, the plaintiffs] has by the default of the seller been deprived of the subject matter of the contract, its higher market value as at the date of repudiation, as compared with the contract price, is not invariably regarded as the true or only measure of damages."<sup>32</sup> That Steyn J.A. used "repudiation" to mean "unlawful rejection" appears from such phrases as "defendant repudiated the sale"<sup>33</sup> and "repudiation by the seller."<sup>34</sup> He again referred to "the ordinary measure of damages in cases such as this, which would be the excess value as at the date of repudiation over the contract price,"<sup>35</sup> and went on referring to the date of repudiation.<sup>36</sup> At 333D he said: "The appellant [Whitfield] repudiated the sale on 15th October and the purchaser accepted the repudiation on 30th October...." On Kerr's interpretation, the plaintiffs-respondents would have accepted their own repudiation! Indeed, although the Appellate Division in *Stewart Wrightson (Pty.) Ltd. v. Thorpe* has deprecated the idea and usage of offer and acceptance of repudiation,<sup>37</sup> one attraction of the usage is that it shows who does the unlawful repudiating and who the lawful. In *Whitfield*, as Steyn J.A. stressed the date of "repudiation," it makes sense to read his words at 335H and 336B, "the date of breach," as synonymous: *ut res magis valeat*.

Brink J.A. agreed with Steyn J.A., so we pass on to De Villiers J.A.'s judgment. Kerr's interpretation is disproved by the judge's words, "the defendant [Whitfield] could ... have contemplated that on repudiation by him of the contract he would make himself liable to make good the loss ... to the plaintiffs, if the plaintiffs chose to accept his repudiation...."<sup>38</sup> and "In my view, the facts detailed above do not take the instant case



out of the ordinary class subject to the ordinary measure of damage."<sup>38</sup> The judge referred to the ordinary measure of damages as "the difference between the value of the farm at the date of repudiation and the contract price."<sup>39</sup> In his summary of the plaintiffs'-respondents' argument<sup>40</sup>-- "He now repudiated the sale. We accept his repudiation"-- and his continuing reference to this date,<sup>41</sup> his usage of "repudiation" resembled Steyn J.A.'s, so that similar difficulty results from Kerr's reading of *Whitfield*. At 350D, De Villiers J.A. said that what "the plaintiffs bought in August ... was the farm.... When the defendant repudiated, they lost (a) the farm...." On Kerr's interpretation, I do not understand the second sentence.

Finally, we come to Hall A.J.A., who, in Kerr's view,<sup>42</sup>

spoke of "the date of rescission" (353C) when he presumably meant the date of cancellation since he had spoken three lines earlier of the respondents electing to abide by the appellant's decision to rescind the contract. The terminology suggested by Hall A.J.A. should not be used -- the appellant being the defaulting party could not himself cancel the contract. He could and did (321B-C) repudiate it, giving respondents grounds to cancel it.

Hall A.J.A. said:<sup>43</sup>

My brother HOEXTER has adopted, as I understand his judgment, an entirely different basis for the assessment of damages. The contemplation which he envisages and upon which he bases his assessment is that the only factor which the parties could possibly have contemplated when they entered into the contract was what the respondents would do if the appellant were to break the contract. He postulates that, if the respondents elected to abide by the appellant's decision to rescind the contract, they would be entitled, with one minor exception, to nothing more than what they could prove to be the amount by which the market value of the farm on the date of rescission exceeded the price they paid for it. I cannot find in the record ... proof of any facts from which this view of what was in the contemplation of the parties could be deduced. It seems to me unlikely that either the appellant or the respondents contemplated, at the time the sale was concluded, what the result would be if either of them repudiated the contract.

Hall A.J.A. used "rescind" in the sense of "repudiate", as appears from the clause "if the respondents were to abide by the appellant's decision to rescind the contract." So "the date of rescission" must have meant "the date of repudiation, the date of breach." Unfortunately, Hall A.J.A. misunderstood Hoexter J.A.'s judgment, which took the date of cancellation, of acceptance of the repudiation, as the date of assesment.<sup>44</sup> Yet, as Hall A.J.A. agreed with Steyn J.A.'s assessment of damages,<sup>45</sup> his judgment is

reconcilable with the clearer one by Steyn J.A. Furthermore, by correcting Hall A.J.A.'s use of the word "rescission", Kerr<sup>42</sup> implicitly concedes the view taken by Steyn and De Villiers JJ.A.: that the ordinary date for assessment is that of repudiation, in other words, the date of breach. So Kerr's remarks on *Whitfield* contradict themselves and do not confirm his interpretation of *Celliers* except in so far as he is supported by Hoexter J.A.

Since Kerr on *Sale* was published, a Full Bench of the Cape Provincial Division in *Culverwell and Another v. Brown* has spoken on the date for assessing the buyer's damages for breach of contract.<sup>46</sup> Friedman J. for the court held that one line of cases had decided the date of repudiation (that is, of breach) as the relevant time; and another line had decided the date of acceptance of the repudiation as the relevant time.<sup>47</sup> In the second line he included *Whitfield* 1957 (3) S.A. at 324 and 325: both passages are in the judgment of Hoexter J.A., who as I have shown differed from his brethren. In *Culverwell* Friedman J. went on to hold that the date of breach was not always the proper time for assessment; the date of cancellation was more logical.<sup>48</sup> He referred to *Novick*; *De Wet and Yeats*;<sup>49</sup> and Kerr on *Sale*.<sup>50</sup> So Kerr now has another recent judgment of provincial division status to support his argument. We may add that *Benson v. S.A. Mutual Life Assurance Society*,<sup>51</sup> by confirming the plaintiff's right to specific performance, indirectly corroborates Kerr's argument that the contract remains alive while the aggrieved party makes up his mind which remedy to choose, and that damages for loss of the contract should be assessed at the date when he decides to bring the contract to an end and claim damages.

### Notes

1. KERR, SALE 329.
2. *Supra* chapter 12, note 120.
3. 1977 (4) S.A. 855 (A) 880B.
4. 1904 T.S. 73.
5. (1906) 23 S.C. 250.
6. 1917 T.P.D. 184, 186.
7. 1957 (3) S.A. 318 (A).
8. (1906) 23 S.C., 255.
9. KERR, SALE 108.
10. 1904 T.S., 84.

11. 1972 (2) S.A., 861H.
12. *Compare* MACKEURTAN'S SALE 117 and n. 27; 7 JOUBERT, THE LAW OF SOUTH AFRICA 29 n. 5.
13. 1917 T.P.D, 186.
14. On the word's possible ambiguity, *see* KERR, CONTRACT 333-4, 340-1.
15. KERR, SALE 108 and n. 17.
16. 1917 T.P.D, 184.
17. *Id.*, 185.
18. *Id.*, 186.
19. 1920 T.P.D. 303, 305.
20. *Novick*, 1972 (2) S.A., 862H *per* Trollip J.A.
21. KERR, SALE 109 n. 19.
22. J.D. MAYNE, TREATISE ON DAMAGES 181-2 (7th ed., 1903).
23. *Id.*, footnote *h*, citing *Maclean v. Dunn*, 4 Bingh. 722 (1828); 130 E.R. 947; *Lamond v. Davall*, 9 Q.B. 1030 (1847); 115 E.R. 1569; ; Sale of Goods Act 1893, s. 50 and rejecting *Mertens v. Adcock*, 4 Esp. 251 (1803); 170 E.R. 709.
24. *Id.*, footnote *i*, citing *Boorman v. Nash*, 9 B. & C. 145 (1829); 109 E.R. 54.
25. *Id.*, footnote *j*, citing *Barrow v. Arnaud*, 8 Q.B. 595 (1846); 115 E.R. 1000.
26. 1917 T.P.D. 67.
27. 1972 (2) S.A., 862F.
28. KERR, SALE 108 n. 17.
29. 1957 (3) S.A., 324F-325A; 325H.
30. *Id.*, 326E-F.
31. *Id.*, 324A.
32. *Id.*, 329B.
33. *Id.*, 329E; and *see* 333H.
34. *Id.*, 329H.
35. *Id.*, 334B-C.
36. *Id.*, 333D, E, G, H; 334 A, H; 335A, B, G, H; 336A, B, E; 337G; 338A.
37. 1977 (2) S.A. 943 (A) 953E-H; KERR, CONTRACT 341.
38. 1957 (3) S.A., 347H.
39. *Id.*, 348A.
40. *Id.*, 348B.
41. *Id.*, 348D, F; 349D, H; 350D, H ("repudiation by the seller"); 351A.
42. KERR, SALE 108 n. 17 *in fine*.
43. 1957 (3) S.A., 353A-D.
44. *Id.*, 324F-325A, H.
45. *Id.*, 354B-C.
46. 1988 (2) S.A. 468 (C).
47. *Id.*, 476F-I.
48. *Id.*, 476I-477D.

49. DE WET & YEATS, KONTRAKTEREG 194-5.
50. KERR, SALE 106.
51. 1986 (1) S.A. 776 (A).

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6 Edw. I c. 8. Statutes at Large, Vol. 1 (1863).

25 Edw. III, st. 5, c. 17 (1352).

19 Hen. VII, c. 9 (1504).

27 Eliz. I c. 8 (1585). Statutes at Large, Volume 2, p. 640-1, as amended by 31 Eliz. I c. 1 (1589). Statutes at Large, Volume 2, 658-9.

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